Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1027

SS ELECTRA, Her Engines, Tackle, Etc. and RIO PALMEA CIA. NAV., S.A.,
Petitioner

v.

CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, GETTY OIL COMPANY And CITIES SERVICE OIL COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled cause.

OPINIONS BELOW

The opinion of the Commissioner on Damages is printed as Appendix A hereto. The Memorandum Opinion of the United States District Court for the Eastern District

of Texas, Beaumont Division, dated September 29, 1969, is printed as Appendix B to this Petition. The opinion of the United States Court of Appeals to the Fifth Circuit is dated August 11, 1970, and is printed as Appendix C to this Petition. The record in this case consists of two Stipulations between the parties to this litigation which Stipulations are dated May 1, 1969 and the Supplemental Stipulation, July 10, 1969 respectively and are reproduced as Appendix D and E to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

Is double recovery in conflict with all tort authorities, to be tolerated in computing what is the proper measure of damages for the temporary suspension of production of crude oil caused by a ship collision with an oil platform while the platform producing the oil is undergoing repair in a situation where resumption of that production clearly would follow the repair since neither the reservoir nor the wells were damaged, no off-set wells had been drilled from adjacent leases and the reservoir is being produced from wells on a new, nearby platform of the same oil companies?

STATEMENT OF THE CASE

This case arose out of a collision on April 8, 1964, between the SS ELECTRA, a Panamanian steamer owned by petitioner, and an oil platform belonging to the four oil company respondents, libellants-plaintiffs below, which

was set in the Gulf of Mexico off the Louisiana coast on the Outer Continental Shelf. The platform was damaged extensively, and the production of oil from the wells under it suspended during repair.

Respondents filed suit in the U. S. District Court for the Eastern District of Texas after which an agreement between the parties was reached that petitioner would pay the oil companies 90 percent of their damages. All damage issues were then settled except the amount of the oil companies' damages and the measure thereof arising from the delay in recovery of the oil during the period of repair of the platform. This issue was referred to a Commissioner on Damages. Subsequently and before the Commissioner's decision the parties stipulated all facts on the issue (reproduced as Exhibits D and E hereto). The Commissioner and subsequently the U. S. District Court decided the measure of damages based solely on these stipulations, the only facts before them, and subsequently before the U. S. Court of Appeals.

It was decided by the Commissioner and by the District Court below in separate opinions (Appendices A and B hereto) that the damages to be allowed consisted of interest on the $60,000 it was stipulated represented the net value of the production which could have been recovered from the two producing wells of the platform during the stipulated term of the repairs, a period of 130 days. The Court of Appeals reversed, finding that the oil companies were entitled to the full net value of the oil ($60,000, less 10 percent stipulated liability settlement discount) which would have been recovered during suspension of production, categorizing the net value of production as an agreement that this was "the net income realized from oil produced".

REASONS FOR GRANTING WRIT

1. A. This case involves an important question of maritime law in which the Appellate Court below, contrary to all prior authorities and tort principles, awarded a double recovery to Respondents.

B. This conflict and important question of law should be authoritatively settled by this Court not only for its significance to federal maritime law, but,

C. because of the burgeoning instances of increased offshore exploration of oil and gas in the past decade, the clear indications of more and greater activity in this area, and the ever increasing number of ship platform collisions and offshore oil exploration disasters.

2. The decision below is directly in conflict with the tort maxim of restitutio in integrum as enunciated in *Standard Oil v. Southern Pacific Co.*, 268 U.S. 146 (1925), resulting in a double recovery to Respondents, and as such is clearly wrong, leaving no proper guide to the interests who must adjust these substantial losses.

3. The Santa Barbara and Chevron platform accidents, ruptures and pollutions could as easily have been caused by ship-platform collisions as from other causes. How would the delay in resumption of production be measured in such catastrophes and how can the maritime community know what measure of insurance is needed to guard against such losses of gigantic proportions with virtually no authority as a guide?

1. A. This case involves an important question of maritime law in which the Appellate Court below, contrary to all prior authorities and tort principles, awarded a double recovery to Respondents.

B. This conflict and important question of law should be authoritatively settled by this Court not only for its significance to federal maritime law, but,

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Stationary platforms producing oil and natural gas from the sea bed of the Outer Continental Shelf, extending literally hundreds of miles off the coast of the United States into the U. S. Gulf of Mexico and off California, have substantially increased during the 1960s and promise to do so in the future. Such semi-permanent platforms of substantial dimensions stand astride historic shipping lanes and with their proliferation in the past decade have caused tremendous conflict between the maritime and oil producing communities.

In Shipping Safety Fairways, *Journal of Maritime Law And Commerce*,[1] the author points out that more than fifty collisions involving ships and offshore installations have occurred in the Gulf of Mexico since 1960. This figure is, according to the author, "probably low as colli-

1. Volume No. 1, October, 1969, Pages 1-20 a copy of which is made Appendix F hereto.

sions involving all types of vessels are included and if consideration is given to an apparently large number of unreported incidents. According to statistics compiled by the author in the quoted Journal "It has been estimated that there are at present approximately 6,000 oil or other platforms in the Gulf, of which more than half are in or near shipping lanes and, obviously, pose a hazard to navigation."[2]

Many of such collisions are of serious consequence and involve amounts approaching or exceeding a million dollars. Each time a platform sustains damage of any consequence there is an attendant delay during repairs in the recovery of the oil or gas. How is this loss to be measured? The only Courts to have spoken on the subject previously are the Southern and Eastern Districts of Texas which reached diametrically opposed results.[3]

Despite the demarcation since this collision of the so-called "fairways" through the more heavily trafficked areas of the U. S. Gulf, collisions have not been prevented by publication of "fairways" in the Federal Register[4] and as is wisely pointed out by the author of Shipping Safety Fairways "A vessel making its way from New Orleans to Galveston could hardly be expected to travel 70 miles seaward, thence along the parallel fairway from the New Orleans area to the Galveston area, and then 140 miles

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2. Page 3, Journal of Maritime Law and Commerce, Vol. 1, October 1, 1969.

3. See *Continental Oil Co. v. M/S GLENVILLE*, as discussed in the opinions below herein, unreported, wherein the District Court and Commissioner awarded damages on the same formula as the Fifth Circuit below, contrary to the Commissioner and U. S. District Court in this case.

4. See *Chevron Oil Co. v. M/V New Yorker, etc., et al*, 297 F. Supp. 412 (E.D. La., 1969).

landward to Galveston, when the trip could be shortened nearly 200 miles, and without unreasonably increasing the chances of collision, by cutting directly across from the mouth of the Mississippi to the Port of Galveston."[5]

2. The decision below is directly in conflict with the tort maxim of restitutio in integrum as enunciated in *Standard Oil v. Southern Pacific Co.*, 268 U.S. 146 (1925), resulting in a double recovery to Respondents, and as such is clearly wrong, leaving no proper guide to the interests who must adjust these substantial losses.

Petitioner submits that the Commissioner on Damages and U. S. District Judge in carefully examining the stipulated facts which constituted the entire record below arrived at the proper decision in determining that the delay in recovery of oil, the suspension of 130 days production of oil without the actual loss of the oil, the temporary deprivation of capital from these oil companies ($60,000) required under tort principles in general and specifically in maritime law[6] the result contended for by petitioner that the damages were limited to interest on the capital detained ($60,000 for 130 days × 6% interest). Any other result awards the oil companies double recovery, for the oil is still in the undamaged reservoir and was or is being recovered by respondents. Non-availability of an asset for a period of time does not give rise to a cause of action for recovery of its full value during the period the asset (oil worth $60,000) was not available. The Court of Appeals refused to consider the double recovery

5. Page 18 *Journal of Maritime Law and Commerce*, Volume 1, October 1, 1969.

6. *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925).

argument other than mentioning it in passing,[7] but on the contrary has distorted the stipulation of facts from an agreement between the parties as to the *"net value of the production"* to an agreement as to *"the net income realized from oil produced"*. (Page 43 of opinion by Court of Appeals, Appendix C.) This central theme of the Appellate Court was repeated and this error pervaded their decision again on Page 44 of their opinion, wherein they discussed "profit on oil production is simply one means of measuring the damage suffered" and "The only evidence before us is of lost profit."

Without any measure of evidence whatsoever as to the "capital investment in lease, platform and producing well for 130 days" (page 44 of Court of Appeals decision) the Appellate Court has translated the stipulation from one of net value of production to delineation of such as "profit" to which the parties did not in fact stipulate. What profit the oil companies would have made during these 130 days is a matter of complete speculation, for the record is devoid of any evidence as to the cost of marketing, sale, refining and like expenses which inevitably would accompany sale and ultimately lead to delayed "profit".

In order to save the Court and parties time and money a stipulation between the parties was entered into. (App. D and E) It has been misinterpreted and/or prostituted by the Court below to the extent that the effect thereof has totally been changed, the wording and intent thereof ignored and an improper decision reached as a result.

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7. "In this Court the shipowner continues to focus on the fact that plaintiffs have not lost oil as a capital asset and strenuously insists that to allow $60,000 as damages is to allow a double recovery". Page 3 of opinion of Court of Appeals, Appendix C.

The evidence is limited to the stipulation(s) and this is a distinct distortion of what was stipulated to by the parties. Net income and the net value of the oil production are certainly two different items. The Court has changed and confused the clear meaning of the facts stipulated by the parties. Net income has never been stipulated and does not appear in this record. Such would include a consideration of such items as marketing and sales expenses whereas the stipulated figure pertains only to the value of the crude less the cost of raising it to the surface, barging it and paying the royalty owner, the U. S. Government. By its error the Circuit Court below violated this Court's rule enunciated in *The Potomac*, 105 U.S. 630, 631 (1882), which it purported to follow, wherein it quoted: "in no event can more than the *net profits* be recovered by way of damages; and the burden is upon the libellant to prove the extent of the damages actually sustained by him" (pg. 45 of Opinion of Court of Appeals).

Accordingly, the Fifth Circuit's decision is bottomed upon 1.) misinterpretation of the stipulation constituting the entire record, and 2.) authorities which do not in any way support the reversal of the Commissioner and District Court.

The two non-maritime cases on which the Court of Appeals relies (page 7 of their opinion) as sole support for their measure of damages being the same as if this were a land based accident completely miss the mark.

These two cases relied upon by the Fifth Circuit (page 7) in its opinion *Cranston Print Works Co. v. Public Service Co. of North Carolina*, 291 F.2d 638 (4th Cir., 1961) and *Brooks Transp. Co. v. McCutcheon*,

154 F.2d 841 (D.C. Cir. 1946) do not support the result. In *Cranston* the defendant public service gas company caused Cranston's boiler to explode through an act of negligence as found by the jury. The jury was asked to assess merely "What amount, if anything, is plaintiff entitled to have and recover of the defendant?", and the answer to the issue was "$26,268.06". Cranston's business was the operation of a cloth printing and dyeing plant which depended to some extent upon its operation of a boiler house damaged by the utility company's negligence. A review of the opinion of some 12 pages reflects that the portion dealing with lost profit is limited to approximately a half a page (291 F.2d 648) and renders it abundantly clear that it is absolutely impossible to tell from the jury finding what was included within their single answer to the damage issue submitted, except that the accountant for the plaintiff estimated a "gross profit" loss of $9,572.57, and that from the physical damage loss which apparently was unopposed, the jury did not award the full loss profit which arose from a shut down of the plant.[8]

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8. The figure $9,572.57 included such items as "stand-by labor, social security taxes, workman's compensation insurance, etc., a total of $10,480.58." Out of pocket expenses were accordingly included in the so-called loss of profits item relied upon by the Fifth Circuit in the case at bar which have no relationship whatever to the question involved herein. Likewise, this item also obviously included, as the Court remarked on Page 649, "interest on the amount found as damages to property." All the *Cranston* case can possibly stand for is that lost profits when proved constitute a proper element of damages with which petitioner takes no exception. The Court's opinion in *Cranston* points out that the only reason more details concerning the lost profits and their calculation were not in the record was a refusal of defendant's counsel to permit the plaintiff's witness to testify concerning such items. In fact the Court stated "A party cannot successfully complain of error for which he, himself, is responsible or of rulings which he has invited the trial court to make."

Brooks Transp. Co. v. McCutcheon on the damage issue merely involved whether there was substantial evidence to support a jury finding of the "reasonable rental value of the damaged trailer" which was involved in a highway accident. The plaintiff was engaged in the business of repairing, servicing, renting, etc. comparable equipment and testified as to the rental loss while the trailer was under repairs. Again that case was dealing with rental of equipment as opposed to sale of an asset with which the oil companies are involved and which they retained despite the casualty.

The analogy made by the Court of Appeals to loss of rentals as opposed to sale of assets will not bear scrutiny. They cannot be approached with the same yardstick where it has been stipulated that the asset is still available but the use of the asset for sale—not rental—has merely been delayed. The only thing detained by the suspension of production was the use of the capital which the oil production would have produced. Thus, the oil companies are not in the same position as a party whose business is limited to rental of equipment the denial of which completely deprived the lessor of income from the asset. The income here deprived was the use of the capital. The oil companies were not leasing the oil, they were bringing it up for sale and it is still available to them for such purpose although at a later date, for which they should receive interest as damages.

The Court was required to consider "the evidence as a whole and in the light most favorable to Cranston" which is all the *Cranston* case can stand for in the way of authority and is certainly no support whatever for the decision below. A dye and cloth printing plant was put out of business effectively by defendant's negligence and we see no corollary between this and the recovery of crude oil for sale which crude oil remains in place available and is being withdrawn by plaintiffs below.

3. The Santa Barbara and Chevron platform accidents, ruptures and pollutions could as easily have been caused by ship-platform collisions as from other causes. How would the delay in resumption of production be measured in such catastrophes and how can the maritime community know what measure of insurance is needed to guard against such losses of gigantic proportions with virtually no authority as a guide?

With the many collisions which have thus far occurred in the U. S. Gulf between ships and platforms it is fortunate—indeed miraculous—that there have been no incidents comparable to the Santa Barbara and Chevron Oil Co. platform pollutions. While these disasters obviously included a loss of oil as opposed to mere delay in its capture, an attendant delay in resumption of production would necessarily be a part of these accidents as well. How they can properly be measured by the maritime community should be decided authoritatively by this Court.

CONCLUSION

For the reasons stated hereinbefore, this Petition for Writ of Certiorari should be granted.[9]

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9. The Cross-Appeal below was rendered moot by the reversal of the decision of the District Court. However, upon the granting of Certiorari, petitioner wishes to preserve this point for consideration by the Court of Appeals which in its opinion states that "Our decision on the appeal makes it unnecessary to discuss the contentions made on the cross-appeal." (Page 47 of opinion.)

The District Court in affirming the Commissioner and adopting in toto the measure of damages contended for by petitioner herein,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Writ of Certiorari has been served upon Mr. Joseph Newton and Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, Attorneys for Respondent, by mailing copies to them at the address stated, first class, postage prepaid, on this 25th day of November, 1970.

George W. Renaudin

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nevertheless and without reason in its opinion (Appendix B) awarded costs against the successful party, the petitioner. The costs were limited to the fee of the Commissioner on damages, $3,500. Petitioner contends that this is unprecedented, that there is nothing in the record to authorize departure from the usual rules pertaining to taxation of costs and in particular to taxation of cost of a Commissioner's fee and in so decreeing the District Court below has effectively repealed all rules and authorities regarding taxation of costs and Commissioner's fees. Preservation of this point for decision by this Court and/or the Court of Appeals is sought by petitioner.

APPENDIX A

REPORT OF LESLIE M. BALL, COMMISSIONER ON DAMAGES

(Number and Title Omitted) (Filed July 28, 1969)

TO THE HONORABLE JOE J. FISHER, UNITED STATES DISTRICT JUDGE OF SAID COURT:

STATEMENT

On April 8, 1964, Libelants were the owners of a drilling and production platform known as Platform "A" located in the East Half of Block 208, Eugene Island Area, in the Gulf of Mexico off the Coast of Louisiana. The Libelants had two oil wells in production on Platform "A".*

On that date the S/S Electra, owned and operated by Respondents collided with the Libelants' Platform "A", damaging it so extensively that the production from the Libelants' wells had to be discontinued. The wells themselves, and the oil and gas reservoir under the platform were not damaged as a result of the collision.*

If the restoration of Platform "A" had been commenced without delay, a period of one hundred thirty (130) days reasonably, would have been required before production of the two (2) wells could have been resumed. The net value of the production which would have been realized during the said one hundred thirty (130) days is Sixty Thousand Dollars ($60,000).*

Platform "A" was never actually repaired, and it was demolished by a hurricane on October 3, 1964.*

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* Stipulation of Facts, Exhibit "A"

The wells in production from Platform "A" at the time of the collision were plugged and abandoned after the platform was demolished.**

Part of the reservoirs which were being produced from Platform "A" at the time of the collision extend across the boundary of Block 208 into a lease held by third parties.**

Additional productive reservoirs which could have been drilled to and produced from Platform "A" also extend across the boundary of Block 208 into a lease held by third parties.**

The reservoirs referred to in paragraphs six and seven were drilled into in 1966 and are being produced from a new platform (designated "F") which was constructed in the east half of Block 208.**

No offset wells have yet been drilled by the adjoining lessor into any of the reservoirs referred to in paragraphs six and seven.**

Above statements of facts have been stipulated to by Proctors for Libelants and Proctors for Respondents, copy of said stipulation marked Exhibit "A" and supplemental stipulation marked Exhibit "B" are attached hereto and made a part hereof, *verbatim.*

Thereafter, Respondent-Claimant herein agreed to pay the Libelants ninety percent (90%) of their provable damages resulting from the said collision. The parties were unable to agree upon the amount of Libelants' damages, and on joint motion of the parties herein, moves the Court to refer the cause to a Commissioner to hear testimony with respect to Libelants' damages and by Order of

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** Supplemental Stipulation of Facts, Exhibit "B".

Reference on the 10th day of May, 1965, referred the cause to this Commissioner to hear evidence with respect to Libelants' damages and to report to this Court conclusions thereon.

The time lapse between the Order of Reference and this report is regrettable. The unseemingly delay resulted from circumstances beyond the control of the Commissioner, the parties and the Proctors.

As a result of extensive conferences, *negotiations* and exchange of invoices and other supporting data, Respondent-Claimant have heretofore paid Libelants the sum of Six Hundred Thirteen Thousand Six Hundred Fifty Dollars ($613,650) for physical damage to their Platform "A" and its equipment.

REMAINING ISSUES IN DISPUTE

(1) Allowance for net loss production for one hundred thirty (130) days as a measure of damages.

(2) Recovery of damages in the amount of Sixty Thousand Dollars ($60,000), which is the stipulated net value of the production which would have been realized during the said one hundred thirty (130) days of net lost production.

CONTENTS OF LIBELANTS AND RESPONDENTS

(1) Libelants claim that their damages should include the net value of the production lost as a result of the collision during the one hundred thirty days (130) the Respondents wrongfully interfered with their operation at this location, i.e., the net value of the production the Libelants would have realized during that one hundred thirty (130) days. Libelants rely heavily on this point in issue,

which was before the District Court in *Continental Oil Company v. MS Glenville*, A.D. 2902, Southern District of Texas, Galveston Division. Trial of the liability issue in that case resulted in a holding in favor of the Libelants (210 F. Supp., 865), and the matter was referred to a special commissioner, as in this case, to hear evidence as to the Libelants' damages. As in this case, one of severally sharply contested issues on that hearing was the Libelants' right to recover the value of the production it lost, because the wells on its plaform, which the Glenville hit, could not be put into production during the period of repair. The undisputed evidence before the Commissioner in that case was that production was delayed for fifty-seven (57) days as a result of the collision, and that the net value of fifty-seven (57) days' production was Fifty Five Thousand six Hundred Eighty-two Dollars ($55,682).[1] The Commissioner in the *Glenville*[2] was under the opinion that the proper measure of damage is the allowance of the net value of the production for fifty-seven (57) days.[3] In the Commissioner's report in the *Glenville* case[4] he recommended as part of the Libelant's damages the net value of lost production, the sum of Fifty-Five Thousand Six

1. It has been stipulated in this connection that if restoration of Platform "A" had been commenced without delay, a period of one hundred thirty (130) days reasonably would have been required before production of the two wells could have been resumed, and the net value of the production which would have been realized during the said one hundred thirty days (130) is Sixty Thousand Dollars ($60,000).

2. Continental Oil Company v. MS Glenville, (210 F.Supp. 865).

3. Respondents vigorously protested the payment of more than interest on the value of the net production for the fifty-seven (57) days.

4. *Continental Oil Company v. MS Glenville* (210 F.Supp. 865).

Hundred Eighty-two Dollars ($55,682). Honorable Allen B. Hannay, United States District Judge for the Southern District of Texas, in a memorandum and order dated March 31, 1967, accepted, adopted and approved the Commissioner's recommendation.

Libelants further rely on the decisions handed down in *Texas Pacific Oil Co. v. Barker*, 17 Tex. 418, 6 S.W.2d 1031 (1928) and *Freeport Sulphur Co. v. America Sulphur Royalty Co.*, 117 Tex. 439, 6 S.W2d 1039 (1928), wherein the Supreme Court of Texas decided that where a mineral lessee has negligently failed to produce in accordance with the terms of its lease, the lessor is entitled to the full royalty he should have received during the period of non-production, even through the unproduced minerals are still in the ground and capable of producing royalty, if and when produced. Libelants' contention in this connection is that if the rule of damages is valid in the contract case, then it would certainly be valid in assessing damages in a tort claim.

Libelants further rely on the decision handed down in *City of Miami v. Western Shipping & Trading Co.*, 232 F.2d (Fifth Circuit, 1956), and cases there cited, wherein it was held a ship owner was entitled to net profits lost for the period his vessel was out of commission due to a collision. Libelants argue that the net value of production lost from their oil wells is squarely analogous to the net profit awarded a ship owner for the period his vessel was out of commission due to a collision.

(2) Respondent-Claimant vigorously opposes Libelants measure of damage, that is allowance for net lost production for one hundred thirty (130) days and assert that the award of the value of the net production, as opposed

to the interest on the value of said production would be an award of double recovery to the Libelants. Respondent Claimant argue that the proper measure of damages would be compensation with a loss of use sustained by the Libelants in this case, as yet uncompensated, interest for a period of one hundred thirty (130) days for the temporary deprivation of the sum of Sixty Thousand Dollars ($60,000).* Respondent-Claimant contend that with the legal rate of interest awarded for the temporary deprivation for the net value of the production which would have been realized would make Libelants whole. Respondent-Claimant contends that any other award would be analogous to Libelants receiving a double recovery from a tort collision. The collision did not damage the oil wells or the reservoir* and that the oil is still in the reservoir and there for the taking by the Libelants. Libelants elected not to restore the platform, having previously been reimbursed by the shipowner in the amount of Six Hundred Thirteen Thousand Six Hundred Fifty Dollars ($613,650) for the physical damage to the Platform "A" and its equipment. Respondent-Claimant points out that the Libelants are the Lessees of the entire Eugene Island Field, Block 208, where at the time of the collision Libelants had four fixed platforms pumping multiple wells.

Respondent-Claimant argues that since the reservoir is undisturbed and the wells undamaged* to award Libelants the full value of their production for one hundred thirty days (130) in full, is a clear double recovery under any standard, that all Libelants have been deprived of is temporarily the use of this production during the one hundred thirty days (130) which production is subject to recap-

* Stipulation of Facts, Exhibit "A"

ture at their option. Libelants are still in possession of their lease and owners of the minerals in place and that their loss, if any, is in fact merely a "suspension production."

Respondent-claimant argues in rebuttal to Libelants' reliance on the decision handed down in City of *Miami v. Western Shipping & Trading Co.*, 233 F.2d (Fifth Circuit, 1956) that if the oil companies in this case are to be compared to a vessel owner they must fall in the category of a fleet operator carrying its own products, such as was under consideration by Judge Chase in *Sinclair Refining Co. v. The American Sun*, 188 F.2d 64 (Second Circuit, 1951). Judge Chase held that the mere delayed used of a vessel caused by collision damage does not *per se* produce an actionable cause for loss of profits, and that the consideration is whether the *fleet* (comparable with the oil companies and the other platform and wells) actually sustained the loss of earnings due to the delay of the damaged vessel. If not, there is no cause of action, for mere delay does not equal loss of profits. Respondent-Claimant squarely puts his point of *denial* of liability on the fact that there was no loss of the oil as there was no loss of profit to the tanker fleet owner in the cited case, although one of its vessels was in fact delayed by collision damages.

Respondent-Claimant contends that return on capital invested or capital detained or delayed is, what occurred in this case, and was considered by the Second Circuit in *Sinclair Refining Co. v. The American Sun.*[1]

Respondent-Claimant refers to the discussion of the fleet problem in *Admiralty Law in the Fifth Circuit*, Vol. 9,

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1. *Sinclair Refining Co. v. The American Sun*, 188 F.2d 64, (Second Circuit, 1951).

No. 5, May, 1968, *Houston Law Review*, pp. 919-920, copies of which are attached to Respondent-Claimant's brief.

Respondent-Claimant contends that the loss of use sustained by the Libelants in this case, as yet uncompensated amounts to the temporary deprivation of the sum of Sixty Thousand Dollars ($60,000) for the period of one hundred thirty (130) days*; and to give Libelants the full value of the oil is to give it to them twice, an unjustifiable double recovery.

CONCLUSION AND RECOMMENDATIONS

The only issue in dispute is proper measure of damage to be awarded Libelants for net lost production for one hundred thirty (130) days.* The net value of the production which would have been realized during the said one hundred thirty (130) days is Sixty Thousand Dollars ($60,000).*

The question of allowing the net value of the production which would have been realized during the said one hundred thirty (130) days has given your Commissioner much concern. After reading and studying Libelants' brief and authorities cited therein, your Commissioner felt that the decision in the *Continental Oil Company v. MS Glenville*[1] case would be like a lighthouse guiding a lost Mariner into safe waters. However, upon close scrutiny of the *Continental Oil Company v. MS Glenville*, supra, decision, where the same point was in issue, it was found that the

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2. Respondent-Claimant's brief, pp. 14-15.

* Stipulation of Facts, Exhibit "A"

1. *Continental Oil Co. v. MS Glenville*, 210 F.Supp. 865.

matter of damages was referred to Honorable John E. Lyle, Special Commissioner to hear evidence as to Libelants' damages. As in this case, one of several sharply contested issues on that hearing was the Libelants' right to recover the net value of the production lost because the wells on its platform which the Glenville had hit could not be put into production during the repair. Libelants' attached as part of their brief, copy of Commissioner Lyle's report, and in close scrutiny of same, your Commissioner finds instead of the lighthouse leading him to calm waters, that he finds himself in shoal waters, since Commissioner Lyle in his report and recommendations states "I am under the opinion that the proper measure of damages is the allowance of the net value of the production for fifty-seven days."[1] Commissioner Lyle did not cite any cases or authorities to support his recommendation that the proper measure of damages would be allowance of the net value of the porduction for 57 days, and in reviewing Honorable Allen B. Hannay's, United States District Judge, memorandum and order dated March 31, 1967,[2] I find that he accepted, adopted and approved the Commissioner's recommendations as to the proper measure of damages, without citing any cases or authorities to support the Commissioner's recommendations and conclusions.

Libelants stress in their brief that whether Libelants would ever be able to get the oil they missed out of the ground on this offshore location is, of course, far from certain. A review of the agreed stipulations shed some light on this point to your Commissioner. The drilling and production platform known as Platform "A" was located

1. Commissioner Lyle's report, p. 11, attached to Libelants' Brief.
2. Attached to Libelants' Brief, pp. 15-17.

in the East half of Block 208, Eugene Island Area, in the Gulf of Mexico, on said date the SS Electra collided with Platform "A".* A review of the supplemental stipulation dated July 10, 1969,** reveals that the wells in production from Platform "A" at the time of the collision were plugged and abandoned after the platform was demolished. That part of the reservoirs which were being produced from Platform "A" at the time of the collision extended across the boundary of Block 208 into a lease held by third parties. That additional productive reservoirs which could have been drilled to and produced from Platform "A" by Libelants also extend across the boundary of Block 208 into a lease held by third parties. At this Point the lighthouse again seems to show the way to your Commissioner into safe waters, since the agreed supplemental stipulation states:* "the reservoirs referred to in paragraph six and seven were drilled into in 1966 and are being produced from a new platform (designated "F") which was constructed in the East half of Block 208. Further no offset wells have yet been drilled by the adjoining Lessor into any of the reservoirs referred to paragraph six and seven." It is apparent to your Commissioner that Libelants instead of re-building Platform "A" which was demolished by a hurricane on October 3, 1964** built a new platform designated "F" in the same East half of Block 208 which was the original area Platform "A" was located and that no offset wells have yet been drilled by adjoining Lessors into any of the reservoirs contained in Block 208 and extending across its boundary into leases held by third parties.

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* Stipulation of Facts, Exhibit "A"

** Supplemental Stipulation of Facts, Exhibit "B".

In reviewing other cases cited in Libelants' brief, and particularly the *Texas Pacific Coal & Oil Co. v. Barker*[1] case and *Freeport Sulphur Co. v. American Sulphur Royalty Co.*[2] case, the Supreme Court of Texas decided that where a mineral Lessee has negligently failed to produce in accordance with the terms of its lease, the Lessor is entitled to the full royalty he should have received during the period of non-production even though the unproduced minerals are still in the ground and capable of producing royalty if and when produced. This is the case where the oil company has exclusive control of drilling rights, and was depriving a third party of their royalties and was a straight out and out breach of contract.

The rule, which permits a Lessor to recover damages for Lessee's breach of covenant to protect or develop oil or gas land, rests on the assumption that it can be shown with reasonable certainty that the Lessor has been deprived of the value of his portion of at least a certain quantity of oil or gas, worth a certain amount which the Lessee would have produced had he exercised proper diligence.[1] Your Commissioner can find no analogy between the present case and facts stipulated and cases cited,[2,3] since in the instant case Libelant has not been deprived of the value of his portion or total amount of the oil still

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1. *Texas Pacific Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S.W. 2d 1039 (1928).

2. *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 418, 6 S.W.2d 1031 (1928).

1. *Summers Oil & Gas*, §139, p. 449.

2. *Texas Pac. Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.2d 1039 (1928).

3. *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 6 S.W.2d 1039 (1928).

in the ground, since it is within his discretion and judgment to re-produce same by sinking new wells, which in this instance was done by Libelant,* out of the same East half of Block 208 in which the original Platform "A" was located. In cases cited,** the Lessor had no control over whether or not the Lessee continued production in good faith, or exercised proper diligence in producing said lease. Since Libelants still own the lease and the oil in the reservoir and have re-drilled wells in the same reservoir that Platform "A" was originally drilling into, new platform being designated "F", and constructed in the original East half of Block 208, it would appear to your Commissioner that to allow full recovery on lost production for 130 (one hundred thirty days) in the amount of Sixty Thousand Dollars ($60,000) would indeed be granting Libelant an unjustifiable double recovery.

In trying to equate the basic rule of marine collision damages, which is *restitutio in integrum*, it is to be noted in *Phoenix Insurance Co. v. The Atlas*,[1] the Court stated:

> "*Restitutio in integrum* is the leading maxim in such cases, and where repairs are practicable, the rule followed by the Admiralty Court in such a case is, that the damages assessed against the Respondent should be sufficient to restore the injured vessel to the condition in which she was at the time the injury was inflicted."

In the instant case the actual cost of repairs to the damaged Platform "A" has heretofore been paid to Libelant by Respondent-Claimant and in trying to apply the

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* Supplemental Stipulation of Facts, Exhibit "B".

1. 93 U.S. 302, 307; 23 L.Ed. 863, 864, 1876.

doctrine of *restitutio in integrum* to the oil left in the ground, it is apparent to your Commissioner that Libelants are in the same position as they were in regard to the oil before the collision, that the same is still intact, before injury to the platform was inflicted. In *Standard Oil Co. v. Southern Pacific Co.*,[2] the Court held that it was "fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, thereby to be put in as good position pecuniarily as if his property had not been destroyed." Again, in the instant case it is hard for your Commissioner to apply the measure of damages as set forth in *Standard Oil Co. v. Southern Pacific Co.*, supra, since in the instant case, the oil in question was not destroyed and is still in place and for all practical purposes is still being produced by Libelants' Platform "F"*.

Libelants in their brief in support of their claim for damages, seek to equate themselves with ship owners.[1] It is apparent to your Commissioner that the Libelants are not ship owners, nor was the platform a vessel.[2] If Libelants are to be placed on the same level as ship owners, then they must necessarily be cast in the category of a fleet operator carrying its own product, such as was under consideration in *Sinclair Refining Co. v. American Sun*.[3] A mere delayed use of a vessel caused by collision

2. 268 U.S. 146, 155; 69 L.Ed. 890, 895, 1925.

1. Libelants' Brief, p. 4.

2. *Paulette Boudreaux Rodrigue, et al, Petitioners v. Aetna Casualty & Surety Co., et al*, 37 Law Week, 4505, (Dec. 6/9/69, & U.S. S.Ct.).

3. 188 F.2d 64 (Second Circuit, 1951).

damage does not *per se* produce an actionable cause for loss of profits. The consideration is whether the *fleet* (comparable, the oil companies and their other platforms and wells)* actually sustained a loss of earnings due to the delay of the damaged vessel. In the instant case there was no loss of oil.** Here, by comparison to the tanker fleet owner there was no loss of oil as there was no loss of profit to the tanker fleet owner, although one of its said vessels was in fact delayed by collision damages (*Sinclair Refining Co. v. American Sun*, supra). In the instant case it is your Commissioner's opinion that Libelants have in fact only lost the use of their profits from oil that could have been produced, had not the accident occurred, which in his opinion the proper measure of damage would be legal interest rate for the loss of said profits. The res or the oil, is still in place in the ground and is for the taking and in all probability is being produced from Libelants' Platform "F".*

CONCLUSIONS

I recommend the loss of use sustained by the Libelants in this case, as yet uncompensated, amounts to the temporary deprivation of the sum of Sixty Thousand Dollars ($60,000) for the period of one hundred thirty (130) days,* the application of the legal interest rate of 6% per annum would entitle Libelants to a measure of damage in the amount of One Thousand Three Hundred Dollars ($1,300).

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* Supplemental Stipulation of Facts, Exhibit "B".

** Stipulation of Facts, Exhibit "A".

To give Libelants the full value of the oil is to give it to them twice—an unjustifiable double recovery, in your Commissioner's opinion.

All of the pleadings, depositions, exhibits, briefs, proposed findings of fact and conclusions of law, and all other papers relating to this matter, which were furnished to the Commissioner by Libelants and Respondent-Claimant have been returned to the Clerk of the Court with this report.

Respectfully submitted,

s/ Leslie M. Ball
Leslie M. Ball, Commissioner,
1130 Petroleum Building
Beaumont, Texas 77701

July 25, 1969

APPENDIX B

MEMORANDUM OPINION

(Number and Title Omitted) (Filed September 29, 1969)

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For the Respondents

STATEMENT OF FACTS

Libelants were the owners of a drilling and production platform known as Platform "A", located in the east half of Block 208, Eugene Island Area, in the Gulf of Mexico, off the coast of Louisiana. Two oil wells were in production on Platform "A" prior to April 8, 1964. On that date the S/S Electra, a vessel owned and operated by the Respondents, collided with Platform "A", damaging it so extensively that the production from the wells had to be discontinued. The wells themselves and the oil and gas reservoir under the platform were not damaged as a result of the collision, however. Platform "A" was never repaired, and it was demolished by a hurricane on October 3, 1964. Thereafter, the wells in production from Platform "A" at the time of the collision were plugged and abandoned.

Part of the reservoirs which were being produced from Platform "A" prior to the collision, as well as additional productive reservoirs which could have been drilled into and produced from Platform "A", extended across the boundary of Block 208 into a lease held by third parties. However, no offset wells have been drilled by the adjoining lessor into any of these reservoirs. These reservoirs were drilled into by Libelants in 1966 and are being produced from a new platform (designated "F") which was constructed in the east half of Block 208.

Respondents agreed to pay Libelants ninety-percent of their provable damages resulting from the collision and subsequently have paid to Libelants the sum of $613,650.00 for physical damage to their Platform "A" and its equipment. The parties were unable to resolve other issues respecting damages, however, and on joint motion of the parties, the Court referred the cause to a Commissioner to hear testimony with respect to these matters and to report his conclusions to the Court.

It is stipulated by the parties that, if the restoration of Platform "A" had been commenced without delay, a period of 130 days reasonably would have been required before production of the two wells could have been resumed. The net value of the production which would have been realized during this 130-day period is $60,000.00. Libelants claim that their damages should include the net value of the production which would have been realized during the 130-day period but for the Respondents' wrongful interference with their operations at this location. Respondents argue that the proper measure of damages would be compensation for the loss of the use and enjoyment of the sum of $60,000.00, the value of the lost

production, in the form of interest at the legal rate of 6% for 130 days.

CONTENTIONS OF THE PARTIES

In arguing their case to the Commissioner, Libelants relied upon the substantially similar case of *Continental Oil Co. v. M S Glenville*, A.D. 2092, Southern District of Texas, Galveston Division. There, as in this case, the Respondents' vessel collided with the Libelants' offshore platform, resulting in damage thereto and delay of production for 57 days. In that case the Commissioner on damages recommended that the proper measure of damages was the allowance of the net value of the production for 57 days, a sum of $55,682. The Honorable Allen B. Hannay, United States District Judge for the Southern District of Texas, in a memorandum and order dated March 31, 1967, accepted, adopted and approved the Commissioner's recommendation. Neither the Commissioner nor the Court cited any authority in support of this conclusion.

Libelants bolster their position with two lines of argument. Firstly, they point to two landmark cases in Texas mineral law, *Texas Pacific Oil Co. v. Barker*, 17 Tex. 418, 6 S.W.2d 1031 (1929) and *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 6 S.W.2d 1039 (1928), in which the Supreme Court of Texas held that where a mineral lessee negligently fails to produce in accordance with the terms of its lease the lessor is entitled to recover the full royalty he should have received during the period of nonproduction, even though the unproduced minerals are still in the ground and capable of producing royalty if and when extracted in the future. Libelants

contend that this rule should be valid in assessing damages in a tort claim as well as in a contract case.

Secondly, Libelants rely on *City of Miami v. Western Shipping & Trading Co.*, 232 F.2d 847 (5th Cir. 1956), and cases there cited, which held that a ship owner may properly recover net profits lost for the period his vessel is disabled as the result of a collision. Libelants contend that in their position they are properly to be regarded like shipowners.

Respondents argue that, since the reservoir is undisturbed and the wells undamaged, to award Libelants the full value of their production for 130 days would be to allow a double recovery. They contend that Libelants have only been temporarily deprived of the use of production of a value of $60,000.00. Libelants are still in possession of the lease and owners of the minerals in place, and it is insisted that their loss represents no more that a temporary suspension of production. Respondents point out that Libelants are the lessees of the entire Block 208, where at the time of the collision involved here they had four fixed platforms pumping multiple wells.

In meeting Libelants' contention founded upon the *Western Shipping & Trading Co.* case, supra, Respondents argue that Libelants are less aptly compared to a vessel owner, which has suffered disabling damage to his ship, than they are comparable under the circumstances to the fleet operator carrying its own products. In this connection we are directed to the case of *Sinclair Refining Co. v. The American Sun*, 188 F.2d 64 (2nd Cir. 1951), where it was held that their mere delayed use of a vessel caused by collision damage does not *per se* produce an actionable cause for loss of profits, and that the consideration is

whether the *fleet* actually sustained a loss of earnings due to the loss of the damaged vessel for a period of time. In that case it was not shown at trial that there was in fact any loss of profit to the tanker fleet owner, though one of its vessels was damaged in a collision and had to be temporarily taken out of service. Respondents argue that Libelants, with their other platforms and wells, are analogous in their position to the fleet tanker, and that a loss of profit is not shown by a simple showing of the non-availability of an asset for a period of time. In that situation it is urged that the proper measure of damages is interest on the value of the detained capital.

COMMISSIONER'S FINDINGS

The Commissioner's findings were substantially in agreement with the contentions of Respondents. The Commissioner was impressed with the circumstance that the Libelants had drilled other wells into the same reservoirs from a new platform in the same block as Platform "A", and that no offset wells have yet been drilled into these reservoirs by adjoining lessors. He distinguished the *Barker* and *Freeport Sulphur Co.* cases, supra, relied upon by Libelants, because in those cases the lessor had no control over whether or not the lessee continued production in good faith so that royalties would accrue to the lessor. Since these Libelants still own the lease and the oil in the reservoirs and have again drilled into the reservoirs from a new platform, it was the Commissioner's opinion that they have not been permanently deprived of any portion of the oil and gas because of Respondents' wrongful act. The Commissioner cites the case of *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146 (1925), in which the rule was laid down that "where property is

destroyed by wrongful act the owner is entitled to its money equivalent, thereby to be put in as good position pecuniarily as if his property had not been destroyed." He concludes that in this case the Libelants are in the same position as they were in regard to the oil before the collision, since the oil was not destroyed and is still in place and being produced by Libelants.

On the matter of the ship owner-fleet owner analogy, the Commissioner agreed with Respondents that Libelants are more properly classed in the category of fleet owners carrying their own products, and accordingly that mere delay in the use of a capital asset due to collision damage does not establish an actionable cause for loss of profits. In summary, the Commissioner stated his inability to concur with the holding of the Court in the *Glenville* case, supra, and recommended that the Libelants be compensated only for the loss of the use of their profits from oil that could have been produced had the accident not occurred, the measure thereof being the legal rate of interest.

DISCUSSION AND CONCLUSIONS

We agree with the Commissioner's conclusion that Libelants' reliance upon the *Barker* and *Freeport Sulphur Co.* cases is misplaced. We have concluded that the decisions in those cases were largely influenced by the peculiar principles of contract and property law there involved. It is not at all clear that they should be extended to govern a case such as this which sounds in tort. In Texas, a so-called lease contract operates to invest the party called lessee and his assigns with title to oil and gas in place. *W. T. Waggoner Estate v. Sigler Oil Company,*

118 Tex. 509, 19 S.W.2d 27 (1929). Where a running lease provides for oil or gas royalties, the law implies the obligation of the lessee to continue the development and production of oil or gas with reasonable diligence. *W. T. Waggoner Estate v. Sigler*, supra; *T. P. Coal & Oil Co. v. Barker*, supra; *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, supra. The same cases will serve to support the proposition that breach of the lessee's implied obligation for reasonable mineral operations will not authorize the forfeiture of the lease as for breach of condition subsequent, such obligation being a covenant. The usual remedy for breach of the lessee's implied covenant for reasonable development of oil and gas is an action for damages. In holding that plaintiffs could recover the full value of the royalty which would have accrued to them had the minerals been produced with reasonable diligence, the Court said in *Barker*:

> *"The purpose of the law to give compensation for breach of contract is subserved by allowing the injured party to have the value to him of the contract's performance.* 3 Williston on Contracts, §§1338, 1339, pp. 2392 to 2394. Performance of a covenant to produce a certain quantity of oil or gas, under a contract promising royalty, is worth to the lessor as much as the value of his royalty at the time the oil or gas should have been produced and delivered or marketed. Therefore, to allow the lessor the value of royalty wrongfully withheld from him complies with the law's fundamental purpose of adequate compensation. *The lessor is put in the same position as though the contract had been performed. Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 6 S.W.2d 1039, this day decided." Supra at p. 1037.

The contractual nature of the rationale underlying the *Barker* and *Freeport Sulphur* cases is emphasized by the opinion in *Curry v. Texas Co.*, 18 S.W.2d 256 (Tex. Civ. App. Eastland, 1929 writ dism'd). There the Court, in discussing the rule of those cases wrote as follows:

> "*Damages for breach of contract are something different from damages for tort. The latter are given by way of restoration to the injured party of what he has lost or will lose as the result of another's wrong; the former are to compensate one party to the contract for the breach by the other by allowing the value to him of such performance.* If, in the case of breach of contract, the law would do no more than to allow only such damages as would save the plaintiff from loss from having made the contract, that would amount to a refusal of the law to enforce performance of a contract by means of assessing damages." At p. 261.

Thus, it would seem apparent that the purpose of the rule providing that the lessor may recover the full value of royalty payments withheld is to assure that the lessor is put in the same position as though the contract had been performed. The lessor's royalty is the measure of the value of the lessee's performance. The lessor pays the consideration for the lessee's performance by his conveyance to the lessee of the oil and gas, and the lessee is not therefore entitled to deduct the value of the unmined minerals—which the lessee was entitled to remove from the leased premises—from the value of the lessor's royalty. *Barker*, supra at 1037.

Such a purpose is quite different from the purpose which damages in tort or in admiralty are designed to serve. Under tort theory the wrongdoer must make the

injured party whole again by compensating him for any loss proximately caused by the wrongful act. In the case of a maritime tort, the governing principle is expressed in the maxim "restitutio in integrum" *City of Miami v. Western Shipping & Trading Co.*, 232 F.2d 851 (5th Cir. 1956). The vessel owner may recover as damages an amount necessary to restore her to her condition before the accident, and also for the loss of profits or for the use of a vessel pending repairs or other detention arising from a collision, this last element of damage being commonly called "demurrage." *City of Miami v. Western Shipping & Trading Co.*, supra at 852. The Court of Appeals in that case relied upon the opinion of the Supreme Court in *The Conqueror*, 166 U.S. 110 (1897), wherein it is stated as follows at p. 125:

> "It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty . . . *It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair.*" (Emphasis added)

and at 127:

> "The damages must not be merely speculative, and something else must be shown than the simple fact that the vessel was laid up for repairs."

In *Brooklyn Eastern District Terminal v. United States*, 287 U.S. 170 (1932), the Court enumerated the possibilities of measuring demurrage for a disabled vessel variously at the rate of the value of her hire, at the cost of a substitute, at the interest on the capital value tied

up in the disabled boat during the term of disability. Supra at 173-176. The Court stated that no inexorable rule of law controlled in this matter, but that "[w]e are to have regard in every case to the reasonable probabilities of time and place and circumstance." Supra at 175-176.

It seems that the conclusion which must be drawn from these cases is that a libelant cannot establish a right to recover lost profits as demurrage merly by showing a detention of his vessel. That was the basis of the holding in *Sinclair Refining Co. v. The America Sun*, supra, the "fleet tanker" case relied upon by Respondents, that the ship owner's right to recover demurrage depended upon a showing of loss to his business caused by being deprived of the use of the ship in that business. The measure of damages, said the Court, "should be one that is reasonably adapted to the circumstances of each case so that there will, on the one hand, be no failure to award damages suffered and, on the other, no unreasonable award based upon some theoretical concept of loss." Supra at 66. The point is that loss of profit does not necessarily follow from detention of capital. In *The America Sun*, the Court recognized this where the owner of the disabled ship had other vessels which might be available to carry its cargo. In this case the libelants continue as owners of the oil and gas in place and are free to drill into these reservoirs and sink more wells to recover the same minerals, which they in fact have done.

In their reply brief filed with the Commissioner, Libelants argued that because of Respondents' wrongful act, each barrel of oil which would have been produced during the 130 days that their offshore platform was out of commission will now be produced 130 days later than would

have been the case had the collision not occurred, and that this means that libelants will have to continue production from these wells for 130 days after they would have transferred their productive efforts and capital elsewhere, thus making it impossible for the 130 days production ever to be made up. We cannot understand this line of reasoning. When the wells have been depleted to a point where production is no longer marginally profitable, surely it must be considered that the "lost" production will have been recovered. Libelants cannot contend that there is now less oil in the ground because of Respondents' wrongful act. The 130 days' production will be made up, though it will require 130 days longer to do so. It is for this "detention" of their capital that libelants are entitled to recover. Libelants have not shown that they have lost or will lose any of their oil as a result of Respondents' wrongful act. It seems clear from the cases discussed above that demurrage may be properly awarded only upon a showing of loss of profits or when it may reasonably be supposed that profits have been lost in an amount which can be proved with reasonable certainty. *The Conqueror*, supra at 125. There can be "no unreasonable award based upon some theoretical concept of loss." *Sinclair Refining Co. v. The America Sun*, supra at 66. The interference with profit or enjoyment must not be mere shadow rather than substance, *Brooklyn Eastern Terminal v. United States*, supra at 174-175. A substantial showing of loss of profit has not been made in this case.

For reasons stated we adopt and approve the measure of damages recommended by the Commissioner. Libelants are to be allowed recovery of interest at the rate of six

(66⅔) per cent for a period of 130 days on the stipulation sum of $60,000.00, representing the net value of the production which would have been realized during that time. Further, the Honorable Leslie M. Ball, Commissioner, is entitled to compensation for his services in the sum of $3,500.00, which is assessed as part of the Court costs, and the Court costs are to be taxed and assessed against Respondent.

ENTERED this 29th day of September, 1969.

s/ Joe J. Fisher
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28,751

CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, GETTY OIL COMPANY, AND CITIES SERVICE OIL COMPANY,
Libelants-Appellants, Cross-Appellees,

versus

SS ELECTRA, Her Engines, Tackle, Apparel, Etc., and RIO PALMEA, CIA, NAV., S. A. Her Engines,
Respondents-Appellees, Cross-Appellants,

Appeals from the United States District Court for the Eastern District of Texas

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(August 31, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge: Appellants are four oil companies which owned an offshore drilling platform in the Gulf of Mexico, with which, on April 8, 1964, the appellee S.S. Electra collided. Several wells had been

drilled from the platform, two of which were in production. There was no damage to the wells and no loss of oil, but the platform was so badly wrecked that production was halted.

Appellants filed this libel in rem. An agreement was reached under which appellees agreed to pay 90% of the provable damages resulting from the collision. The agreement was carried out as to physical damage to the platform, but the parties were unable to agree on damages for suspension of production from the wells. By agreement that issue was submitted to a commissioner.

Reconstruction of the platform had been delayed, and a hurricane had demolished it in October, 1964. The parties stipulated that if reconstruction had been started without delay, 130 days would have been required to get the two wells in production again. They agreed that the net value of the production — i.e., the net income realized from oil produced — which appellants would have received during the 130 days would have been $60,000.

After the platform was destroyed by the hurricane, the two wells which had been in production prior to the collision were abandoned. Part of the reservoirs on which the two wells had drawn extended under lands leased to third parties. Other reservoirs of oil which could have been tapped by drilling from the platform also extended under lands leased to third parties. No third parties have drilled offset wells into these reservoirs, but in 1966 appellants drilled into both and currently are obtaining oil from them through wells located at a new offshore station in the same general area as the demolished platform.

The commissioner concluded that appellants' damages for loss of production consisted of interest on the $60,000

net production figure for 130 days. The District court approved the amount so determined. The oil companies contend that the wrong standard was employed in measuring their damages, and urge that they were entitled to an award based on $60,000, the full value of the net production, i.e., 90% of $60,000. By cross appeal the shipowner urges that the District Court erred in taxing against it the commissioner's fee, expenses and court costs.

The commissioner and the District Court erred. They focused on the fact that the oil companies had not shown that they had lost any oil as a result of the collision. As they viewed the matter, since the oil was still intact and available the plaintiffs ultimately could bring it to the surface and realize profit therefrom just as they would have during the 130 day period had they been operating — or at least they had not proved with reasonable certainty that this would not occur, so that their loss was purely theoretical. In this court the shipowner continues to focus on the fact that plaintiffs have not lost oil as a capital asset and strenuously insists that to allow $60,000 as damages is to allow a double recovery.

All of this wholly misses the mark. The oil companies do not claim for lost oil or damage to oil as an asset. Their suit is for damages suffered as a consequence of the collision of the ship with the platform. Profit on oil production is simply one means of measuring the damage suffered. The plaintiffs have lost the use of their capital investment in lease, platform and producing wells for 130 days during which that investment was tied up without return. The fact that the same amount of profit can be made at a later time with the same investment of capital by removing from the ground a like quantity of

oil at the same site does not alter the fact that the plaintiffs are out of pocket a return on 130 days use of their investment. Presumably the oil companies ultimately will produce from the reservoir all the oil that is economic to produce, but, as the District Court pointed out, it will require 130 days longer to do so. The plaintiffs must stay on the site 130 days longer, with investment in place, than necessary but for the ship's negligence.

This is no theoretical, shadowy concept of loss. It is squarely within the basic damage doctrine for marine collision of *restitutio in integrum*, as applied in many comparable situations. Thus, for the vessel laid up for repairs:

> In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libellant to prove the extent of the damages actually sustained by him.

The Potomac, 105 U.S. 630, 631, 632, 26 L.Ed. 1194 (1882). Accord, *The Conqueror*, 166 U.S. 110, 41 L.Ed. 937 (1897); *The Pocahontas*, 109 F.2d 929, 931 (2d Cir.), *cert. denied, sub nom. Eagle Transport Company v. United States*, 310 U.S. 641, 84 L.Ed. 1409 (1940);

Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869 (2d Cir.), *cert. denied, sub nom. Agwilines, Inc. v. Motorship San Veronico*, 328 U.S. 835, 90 L.Ed. 1611 (1946). As to vessel under charter, *City of Miami v. Western Shipping & Trading Co.*, 232 F.2d 847 (5th Cir. 1956); *The El Monte*, 252 Fed. 59 (5th Cir.), *cert. denied, sub nom. Southern Pacific Co. v. Stag Line*, 248 U.S. 573, 63 L.Ed. 427 (1918).

Brooklyn Eastern District Terminal v. United States, 287 U.S. 170, 77 L.Ed. 240 (1932) points out that depending upon the circumstances, the damages in some instances may be the value of hire of another vessel, in others the value of hire of the disabled vessel, in others the return upon capital, and, of course, in some cases no damage at all.[1]

The appellee shipowner derives no aid from the fleet cases on which it relies. If the shipowner is carrying his own cargo and has another vessel available as a temporary replacement for the one under repair he has a duty to use it to mitigate damages and, having earned the profit with the otherwise idle replacement, cannot recover for detention of the vessel being repaired.[2] There is no fleet of

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1. In *Brooklyn Terminal*, the plaintiff, with one tug disabled by defendant's fault, used its other two tugs to perform the work previously done by three. Plaintiff presented no evidence of extra expense incurred or increased wear and tear on the two tugs. Thus, having performed the work of the idle tug and presumably earned such profit as there was in the work, and having proved no increase in cost, it could not recover for detention of the tug under repair. This has no application to the oil companies in this case whose work was closed down.

2. Brooklyn Terminal, *supra*; City of Peking, 15 A.C. 438, 6 Asp. 572 (1890). Also see the full discussion in Sinclair Refining Co. v. The America Sun, 188 F.2d 64 (2d Cir. 1951), and Bue, Admiralty Law in the Fifth Circuit, 5 Hous. L. Rev. 767 at 919-20.

drilling platforms, no evidence that the plaintiffs had any other platform or could have set a platform in place and obtained any of the 130 days' production. The oil companies are like a single shipowner with his ship laid up. It would be no answer to his claim to assert that he has lost nothing because the same cargo is still on the dock when his ship comes out of repair and he can move it then, if other cargoes are also then available.

Our conclusion is consistent with that of the United States District Court for the Eastern District of Texas which in a like case awarded as damages the net production. *Continental Oil Company v. M/S Glenville*, A.D. No. 2092, Mar. 31, 1967.[3]

The appellee urges the inapplicability of shipowner cases because plaintiffs are not shipowners and the platform not a vessel. But the result is no different for a land based accident. *E.g., Cranston Print Works Co. v. Public Service Co. of North Carolina*, 291 F.2d 638 (4th Cir. 1961) (natural gas explosion; held, lost profits from damage to boiler house and equipment recoverable); *Brooks Transp. Co. v. McCutcheon*, 154 F.2d 841 (D.C. Cir. 1946) (motor vehicle collision; held, loss of drayage resulting from collision recoverable); Restatement, Torts §§ 928, 931 (1939).

Our decision on the appeal makes it unnecessary to discuss the contention made on the cross appeal.

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3. We need not consider whether lost profit or a fair return on investment is a better measure. See the discussion in *Sinclair Refining, supra*. The only evidence before us is of lost profit. The shipowner has not asserted that the profit is excessive but has stood on the erroneous theory that profits are not recoverable at all, only interest on profits.

Appellants are entitled to a judgment for 90% of $60,000, with interest thereon from August 9, 1967, the parties having agreed that interest on any sum awarded by the commissioner would commence on that date.

As to the appeal, REVERSED and REMANDED with directions. As to the cross-appeal, AFFIRMED.

APPENDIX D

STIPULATION

(Number and Title Omitted) (Filed May 7, 1969)

The parties hereto for the purposes of this proceeding and none other stipulate the following facts:

1. On April 8, 1964, libelants were the owners of a drilling and production platform known as Platform "A," located in the east half of Block 208, Eugene Island Area, in the Gulf of Mexico. On said date the SS ELECTRA collided with Platform "A."

2. At the time of such collision, the libelants had two oil wells in production on Platform "A." As a result of the collision, Platform "A" was damaged so extensively that the production of these wells had to be discontinued. The wells themselves and the oil and gas reservoir under the platform were not damaged as a result of the collision.

3. If restoration of Platform "A" has been commenced without delay, a period of 130 days reasonably would have been required before production of the two wells could have been resumed. The net value of the production which would have been realized during the said 130 days is $60,000.

4. Platform "A" was never actually repaired, and it was demolished by a hurricane on October 3, 1964.

Dated this 1st day of May, 1969.

APPENDIX E

SUPPLEMENTAL STIPULATION

(Number and Title Omitted) (Filed July 28, 1969)

Supplementing the stipulation dated May 1, 1969, the parties hereto for the purposes of this proceeding and none other stipulate the following facts:

5. The wells in production from Platform "A" at the time of the collision were plugged and abandoned after the platform was demolished.

6. Part of the reservoirs which were being produced from Platform "A" at the time of the collision extend across the boundary of Block 208 into a lease held by third parties.

7. Additional productive reservoirs which could have been drilled to and produced from Platform A also extend across the boundary of Block 208 into a lease held by third parties.

8. The reservoirs referred to in paragraphs 6 and 7 were drilled into in 1966 and are being produced from a new platform (designated "F") which was constructed in the east half of Block 208.

9. No offset wells have yet been drilled by the adjoining lessor into any of the reservoirs referred to in paragraphs 6 and 7.

Dated this 10th day of July, 1969.

APPENDIX "F"

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SHIPPING SAFETY FAIRWAYS: CONFLICT AMELIORATION IN THE GULF OF MEXICO

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The principle, and attendant problems, of multiple or shared use of a physical environment is nowhere better exemplified than in the world ocean. As the respective technologies of the fishing, offshore mineral, shipping, and other industries and user groups have rapidly progressed during the last two decades, conflicts between virtually all of these interests have arisen. It is the purpose of this article to examine the conflict of interest which arose between the shipping industry and the offshore mineral industry in the Gulf of Mexico, and the use of shipping safety fairways[1] as an attempt to ameliorate the adverse effects of that conflict.

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1. The term "shipping safety fairway" is the appellation given by the United States Army Corps of Engineers and the United States Coast and Geodetic Survey to areas of navigable water in which permits for fixed structures and installations have not been granted and are not expected to be granted in the future. The term is used (in its short form, "fairway") predominantly in the Gulf Coast area, whereas "sea-lane" is more often used on the Atlantic and Pacific coasts and in connection with traffic separation plans.

I

BACKGROUND

The history and development of the concept of freedom of the high seas for navigational purposes is too well-known to need review here. Suffice it to note that the Grotian concept of the principle, viz., that no state may exercise dominion over the high seas,[2] has, as the degree and diversity of ocean use increased, gradually blended into the concept that all nations (or their licensees) are equally free to use the high seas, providing that the various states or users accommodate each other where conflicts arise.[3]

The area of the Gulf of Mexico in which the conflict here discussed occurred has been used intensively for navigation for many years, both by commercial transport vessels and by the fishing fleet. Particularly intensive shipping occurs in and between the principal ports of New Orleans and Houston.[4]

The exploitation of non-living resources from the seabed and subsoil of the continental shelf underlying the

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2. This principle was codified in Article 2 of the Convention on the High Seas (done at Geneva on 29 April 1958, [1962] 13 U.S.T. 2313, T.I.A.S., No. 5200, 450 U.N.T.S. 82) which provides that "[t]he high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."

3. Article 2 of the Convention on the High Seas reflects this multiple-use view in providing that "[freedom of the high seas] shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

4. In the calendar year 1965, for instance, New Orleans, with nearly 90 million tons, ranked second only to New York in tonnage shipped, and Houston, with 60 million tons, ranked third. In addition, ports at Beaumont, Port Arthur, Texas City, and Corpus Christi all shipped more than 18 million tons each for the same period.

high seas is, on the other hand, a relative newcomer to the list of uses of the marine environment. Some areas of the seabed closely adjacent to the coast had historically been exploited for living resources and sedentary fisheries,[5] but the exploitation of hydrocarbons and some hard minerals only recently became an economic proposition. Although offshore drilling for oil and gas (first achieved from wharves extending over the ocean off the California coast) began over seventy years ago, it was not until the mid-twentieth century that drilling technology reached the stage where substantial offshore drilling operations were undertaken.

Offshore mineral recovery requires the presence of fixed or mobile installations, the former resting on the seabed, as platforms from which the drilling and production take place.[6] Early offshore drilling installations in scattered locations in the Gulf (usually near the coast) were not looked upon by navigational interests as constituting a threat to safe navigation, but rather were viewed and welcomed by some as navigational aids because of their visual prominence, lighting, and the lack of other adequate navigational aids along portions of the Gulf coast.[7] Following passage of the Submerged Lands Act[8]

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5. See Fulton, the Sovereignty of the Sea 697-98 (1911); Garcia-Amador, The Exploitation and Conservation of the Resources of the Sea 96 (1959).

6. For a description of some of the techniques involved in extracting petroleum from beneath the ocean floor, see 2 Comm'n on Marine Science, Engineering and Resources, Report of the Panel on Marine Engineering and Technology, Part VI, at 161 et seq. (1969).

7. Baker, Navigation Hazards in the Gulf, paper delivered to the Institute of Navigation, Nov. 6, 1969, at 2.

8. 43 U.S.C. §§ 1301-15 (1964) (originally enacted as Act of May 22, 1953, ch. 65, 67 Stat. 29).

and the Outer Continental Shelf Lands Act,[9] the offshore oil and gas industry became extremely active, particularly in the Gulf coast area, and has remained so to this date.[10] It has been estimated that there are at present approximately 6,000 oil or other platforms in the Gulf, of which more than half are in or near shipping lanes[11] and, obviously, pose a hazard to navigation.

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9. 43 U.S.C. §§1331-43 (1964) (originally enacted as Act of August 7, 1953, ch. 345, 67 Stat. 462).

10. The federal-state dispute has little direct effect on the navigation-exploitation conflict, however, since permits for fixed structures must be obtained from the Corps of Engineers under the United States' retained jurisdiction over navigation, even though the right to remove minerals from the underlying seabed and subsoil may rest in the adjacent coastal state vis-a-vis the federal government. See 43 U.S.C. §§ 1311(d), 1314, 1333(f) (1964).

Production of minerals from the outer continental shelf underlying the Gulf of Mexico has increased as follows: oil from 3 million barrels in 1954 to 219 million barrels in 1967; natural gas from 56 billion cubic feet in 1954 to 1,163 billion cubic feet in 1967; sulphur from 98 thousand tons in 1960 (the first year of production) to 1.4 million tons in 1967; salt from 60 thousand tons in 1960 (the first year of production) to 270 thousand tons in 1967. See 1966 U.S. Geological Survey, Mineral Production, Royalty Income, and Related Statistics, 27, 34, 56, and 57.

11. Comm'n on Marine Science, Engineering and Resources, Report of the Panel on Management and Development of the Coastal Zone, pt. III, at 25 (1969). Baker, supra note 7 at 2, states that there are "over 5,000 wells in the open waters of the Gulf of Mexico [and] . . . [a]lmost 2,000 of these wells are in waters exceeding 10 fathoms in depth and thus are a potential danger to every deep sea vessel." See also Griffin, Accommodation of Conflicting Uses Uses of Ocean Space with Special Reference to Navigation Safety Lanes, in The Law of the Sea: The Future of the Sea's Resources 73 (L. Alexander, ed. 1968), where it is stated that by 1965 "there were about 5,000 oil installations, of which 2,000 were in or near shipping areas out to fifty miles from shore."

II

HISTORY AND DEVELOPMENT OF THE FAIRWAY CONCEPT[12]

The concern of private interests as well as federal government agencies with this problem was first aroused in 1948 by an application for a blanket permit, filed with the U.S. Army Corps of Engineers[13] by Stanolind Oil and Gas Company, for the construction of offshore drilling installations in eight areas of the Gulf of Mexico near the entrance channel to Galveston harbor. The Corps issued a public notice on August 24, 1948, in connection with the application, and the American Merchant Marine Institute, among others, protested the issuance of a permit on the

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12. The data for this section was derived principally from interviews and correspondence with representatives of the United States Army Corps of Engineers, New Orleans Engineer District, for whose invaluable assistance I wish to express my appreciation.

This presentation is not concerned with the more traditional fairways and sea-lanes which are designed primarily to prevent collisions between ships in ports and at entrances to ports. The history here outlined is that of the adoption of this general technique to the navigation-offshore structure conflict. For an analysis of the former, see Taylor, Safety Lanes for Marine Navigation, paper presented to Institute of Navigation on October 14, 1966; Ripkin, Routing of Ships at Sea, paper presented to Technical Symposium of Ships' Gear International, July 29, 1958.

13. Although the United States Coast Guard has primary responsibility for safety of navigation (see 14 U.S.C. § 1, et seq., [Supp. IV, 1965-68], amending 14 U.S.C. § 1, et seq. [1964]), the United States Army Corps of Engineers is charged with the responsibility for issuing permits for installations in waters of the United States. The Corps played a prominent role in the Gulf of Mexico settlement because of the technique utilized was to designate areas in which no permits for such structures would be issued, rather than simply to prohibit navigation in some areas or attempt to forbid leasing or other mineral activity in others. Elsewhere the United States Coast Guard has played the leading role in establishing fairways and sea-lanes.

ground that the contemplated structures would constitute hazards to navigation. In an attempt to negotiate a settlement, the Corps conducted conferences on October 22 and November 10, 1948, with representatives of shipping interests, and on November 19, 1948, with representatives of oil interests. As a result, the Corps District Engineer (Galveston District) recommended that a fairway five nautical miles wide, in which no structures would be permitted, be created at the entrance to Galveston harbor. This recommendation was adopted, and the Stanolind application was disapproved, since part of the area in question fell within the recommended fairway. The blanket permit was, therefore, never given, but a number of single permits were issued for the general area outside the recommended fairway.

More thorough consideration of the matter was initiated by a letter dated October 27, 1948, from the office of the Corps Division Engineer, Lower Mississippi Valley, to the District Engineer, New Orleans (clearly in response to the Stanolind application), noting that:

> This office has been giving some thought to the necessity for providing adequate navigation fairways between the open water of the Gulf and the various waterways and bays that empty into or connect with the Gulf of Mexico . . . . As the offshore oil activities increase along the Louisiana and Mississippi coasts this matter will become of increasing importance to navigation. The establishment of definite criteria with respect to the location and width of essential navigation fairways for use in approving permits appears to be necessary for the protection of navigation. . . .

At this stage, and for some time to come, the fairways under consideration extended perpendicularly to the gen-

eral direction of the coastline and only a short distance, seldom more than ten miles, into the ocean. It was not until the mid-1960's that fairways were lengthened substantially, to more than 120 miles in certain instances, and that some were introduced running parallel to the coastline.

As a result of these activities in the Galveston District, a Special Board representing the Commandant of the United States Coast Guard held formal meetings in New Orleans on December 2 and 3, 1948, at which oil and navigational interests were requested to designate representatives or committees to participate in planning discussions with the Corps of Engineers, and to keep their respective interests informed as to the matters covered in the discussions. The navigational interests designated the American Merchant Marine Institute and the New Orleans Steamship Association. The oil companies apparently were reluctant to delegate such responsibility to a committee, preferring at that time to act in their individual capacities because of the highly competitive nature of the search for oil in the Gulf of Mexico. However, the Offshore Operators Committee[14] did represent oil interests from a relatively early date. Between April and July, 1949, the New Orleans Corps of Engineers office held three informal joint conferences with navigational and oil interests to obtain the data necessary to establish fairways and anchorage areas[15] acceptable to the parties concerned.

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14. The Offshore Operators Committee is an industry organization, membership in which is limited to lessees in the Gulf coast area, with associate (non-voting) memberships available for contractors having a substantial interest in offshore operations.

15. "Anchorage areas" are areas contiguous to shipping safety fairways in which production platforms and underwater structures are permitted in limited numbers. See text accompanying note 24, infra.

Contemporaneously with these informal meetings, the Corps sought information from both state and federal leasing agencies, and other affected agencies, as to what areas might predictably be subject to lease (and, therefore, to the erection of fixed structures) in the future. The goal was to designate fairways in which the least expectation of mineral development existed.

At this juncture the matter of the Corps' jurisdiction was raised. There was good reason to question whether the Corps could establish such fairways or, indeed, regulate the installation of offshore structures on the continental shelf under the Rivers and Harbors Act of 1899.[16] However, both the Chief of Engineers and the mineral companies requested the New Orleans Corps office to proceed, the former on the basis that the area did constitute "waters of the United States,"[17] and the latter for

16. The provisions of the Rivers and Harbors Act are found in 33 U.S.C. §§ 401, et seq. (1964). The Chief of Engineers is there given the right to approve plans for structures in "waters of the United States," and the Act prohibits the creation of "any obstruction . . . to the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403 (1964). Not until 1953 was this authority specifically extended to the outer continental shelf (see 43 U.S.C. § 1333 (f)), and, as noted above, even the initial fairways extended beyond the territorial sea of the United States.

17. It is interesting to note in this regard that in the 1934 edition of Orders and Regulations of the Corps of Engineers the following view of the Office of the Corps of Engineers with respect to jurisdiction over coastal waters was stated:

> It is the present practice of the War Department to include within its jurisdiction coastal water of the United States to such distance seaward *as may be necessary to give full effect to the laws for the protection and preservation of the navigable waters of the United States.* This distance is not controlled by any special limits of three or twelve miles which have been set up for other purposes. This practice is an assertion of the right of Congress to prohibit the doing of anything which tends to destroy

self-protection in the event that such jurisdiction did exist or was later construed to exist. Jurisdiction over vessels and the conduct of their operations beyond the territorial sea has been asserted by the United States in other situations,[18] and its extension over structures in navigable waters above the continental shelf would seem to have been as justifiable in 1949 as it is today under the provisions of the Outer Continental Shelf Lands Act.

As negotiations proceeded, moderated by the Corps, fundamental differences of position between the shipping and mineral interests became apparent. Shipping interests naturally desired to establish the largest possible area as the exclusive province of surface transportation, free from installations accompanying mineral development. Certainly the installations were an encroachment, but the trend in this field, as noted above, has been to accommodate *reasonable* interference with freedom of the seas where the interfering activity had value in itself. Thus, there was never an attempt to forbid the mineral activity. The mineral companies, on the other hand, were interested in maintaining the largest possible area open for the erection of offshore structures. This, too, is understandable when one realizes that the offshore industry was in its infancy at this time, that the finding of oil and gas is a speculative proposition at best, and that little was known about

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the navigable capacity of any of the navigable waters of the United States.

U. S. Army Corps of Engineers, Orders and Regulations § 535 (e) (1934) (emphasis added).

18. See, e.g., the Anti-Smuggling Act, 19 U.S.C. §§1701-11 (1964) (originally enacted as Act of August 5, 1935, ch. 438, 49 Stat. 517), and Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, on 29 April 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The United States, of course, retains jurisdiction over its nationals wherever situated.

geologic formations and other elements which would more clearly identify the areas of interest to the mineral industry.

A number of factors facilitated settlement. For one, the shipping interests also had an economic stake in mineral exploitation, since a portion of their tonnage consisted of products of the mineral industry. Secondly, directional drilling techniques made possible the recovery of reserves from beneath fairways in most instances. Thirdly, it was inevitable and necessary to live and operate side by side in the marine environment under amicable circumstances. These and other factors led to tripartite agreements in principle between the oil and shipping interests and the Corps for establishing areas in which no permits for offshore fixed installations would be granted. At this time the agreements were published and distributed by the Corps; they were not published in the Federal Register, nor were the areas established indicated on United States Coast and Geodetic Survey charts.

These negotiations and the public hearings held as a result of proposed promulgation of, and modifications in, fairway locations, proceeded at a rather leisurely pace until the early 1950's. In 1953 the passage of the Submerged Lands Act and the Outer Continental Shelf Lands Act presaged a rapid increase in offshore mineral activity. One result was the publication of the first "official" map of fairways in the New Orleans Engineer District, dated July 1953. A revision issued by the Corps on February 17, 1955, showed thirteen fairway and anchorage areas in the New Orleans District alone.[19]

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19. Revisions were subsequently made on March 30, 1955, September 13, 1956, September 19, 1956, May 21, 1957, August 8, 1961, and November 21, 1961. With the exception of the modification of

As a result of the relatively informal proceedings described above, and consistent with Corps regulations and policies concerning promulgation of rules, a procedure evolved for establishing and modifying fairways. New fairways, or modifications of existing fairways, may be proposed by the Corps, by mineral or navigational interests, or by other interested persons or agencies.[20] Upon initiation of such a request, and in accordance with its established procedure,[21] the Corps publishes a notice of the proposed promulgation or change (the substance of which will have been previously negotiated among the oil and navigational interests, the Corps, and other interested parties), calling for objections to the proposal. If there are none, the addition or modification is adopted upon expiration of the time for filing of objections (usually thirty days). If objections are filed, a public hearing, of which due notice has been given, is held, but in some instances it is possible to handle the objections on an informal basis. In effect, the Corps acts as a mediator, and its practice is not to make any official promulgation without agreement of all interested parties. The latter commonly include fishing interests, the Department of Defense, the Department of the Interior, and affected state agencies and local port authorities.

August 8, 1961, which added the Mississippi River-Gulf Outlet fairway and anchorage area, the changes consisted of relatively minor adjustments. A portion of the latest revision, as of March 1969, is portrayed on pp. 62 & 63.

20. Substantial areas in the Gulf of Mexico are utilized for weapons testing, flight training, and other military purposes. The Department of Defense has, therefore, a significant interest in assuring that the shipping safety fairways are located without the boundaries of such areas.

21. See 33 C.F.R. §§ 209.135, 209.520 (1968).

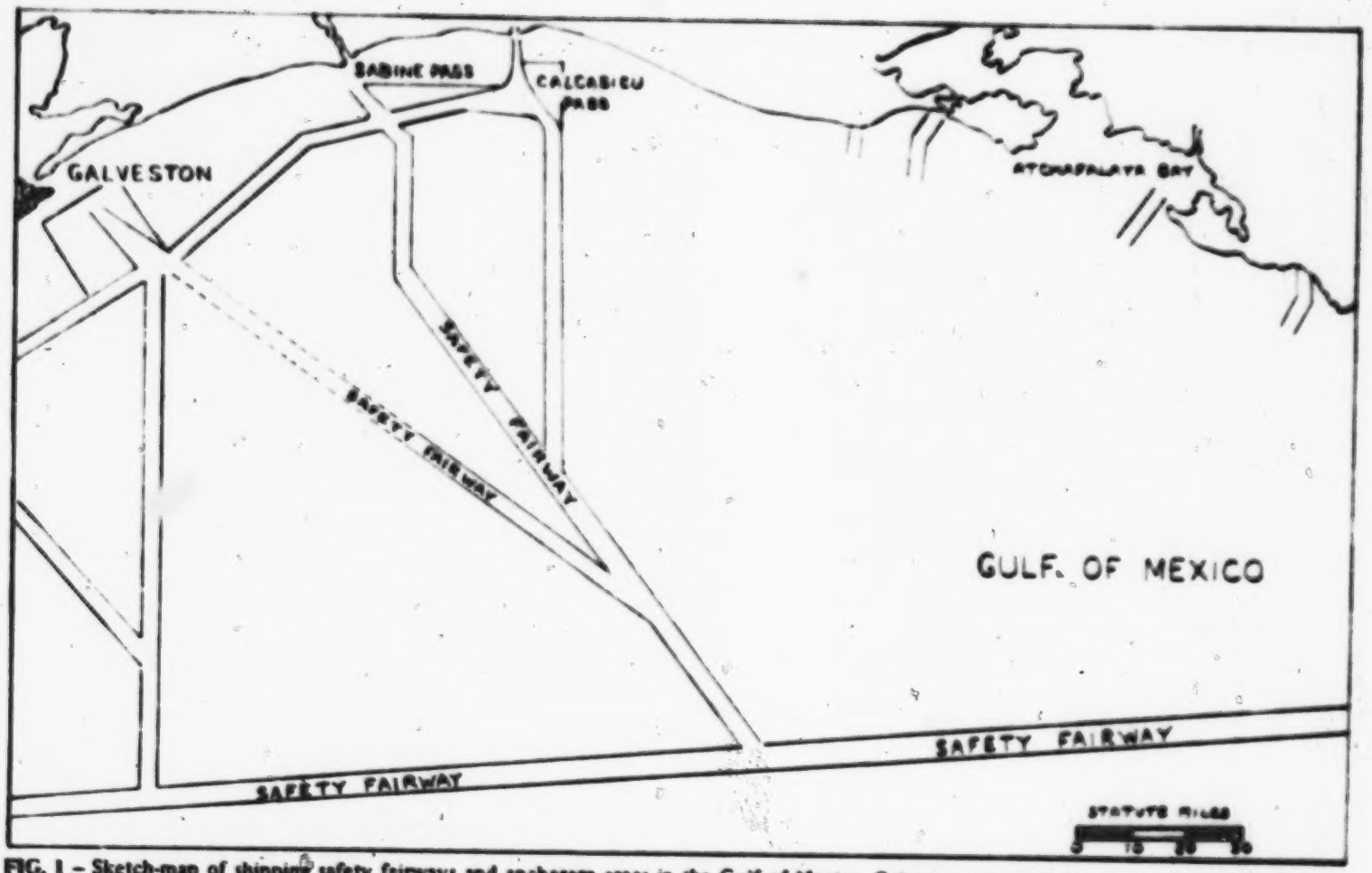

FIG. 1 – Sketch-map of shipping safety fairways and anchorage areas in the Gulf of Mexico, Galveston area, with portion of the parallel fairway between the Galveston and New Orleans areas. (Based on Corps of Engineers' chart, "Shipping Safety Fairways and Anchorage Areas, Gulf of Mexico, New Orleans District," March 1969).

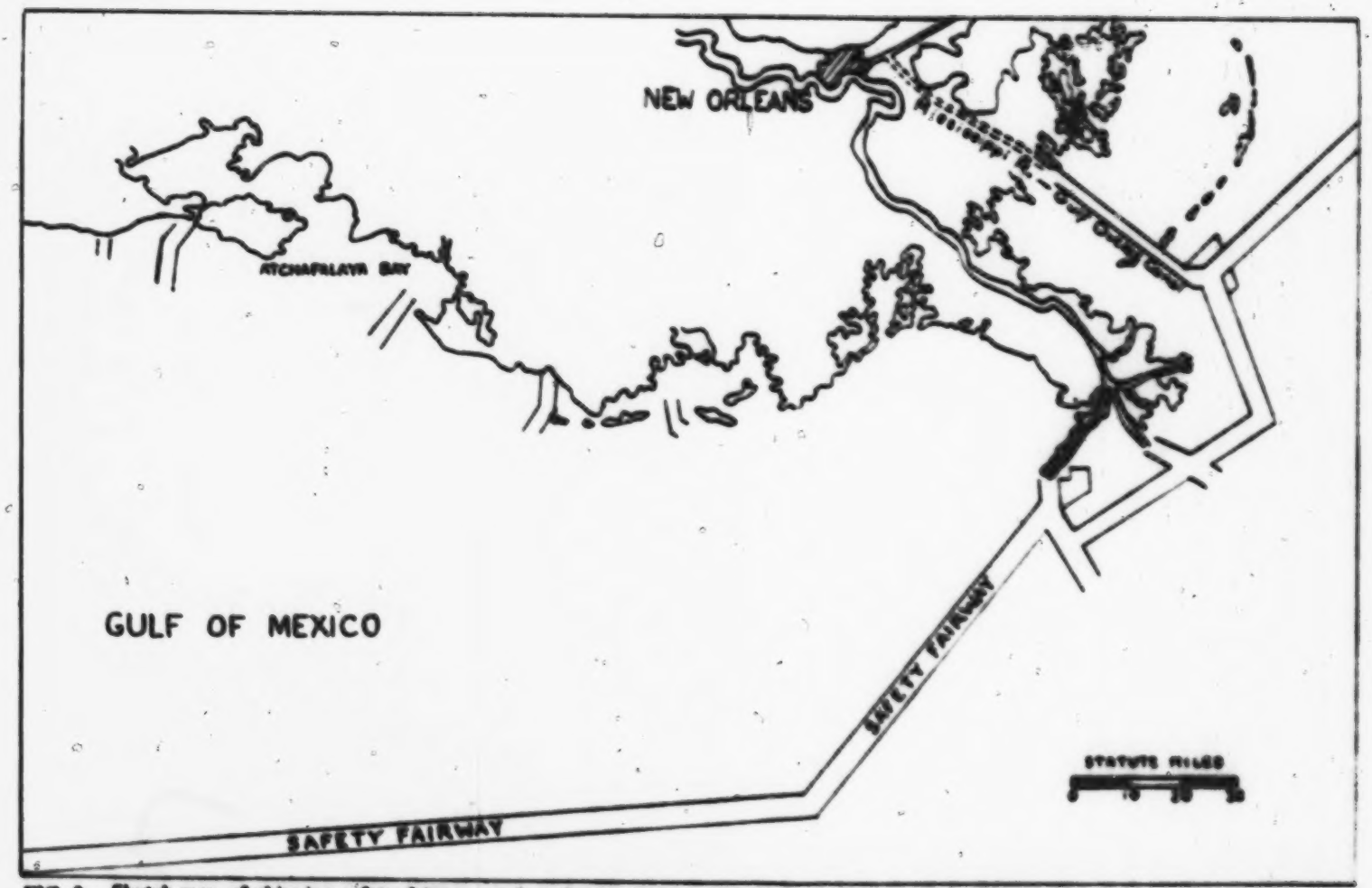

FIG. 2 – Sketch-map of shipping safety fairways and anchorage areas in the Gulf of Mexico, New Orleans area, with portion of the parallel fairway between the New Orleans and Galveston areas. (Based on Corps of Engineers' chart, "Shipping Safety Fairways and Anchorage Areas, Gulf of Mexico, New Orleans District," March 1969).

Following the resolution, at private meetings or public hearings, of any differences of opinion concerning the location of fairways, the Corps issues a notice of the action taken and adjusts its official maps accordingly. Since 1968 fairway designations have also been published in the Federal Register and printed on United States Coast and Geodetic Survey charts. This procedure began in 1962 when the Corps of Engineers proposed that the Coast and Geodetic Survey nautical charts show fairway and anchorage areas. Two reasons for the request were specified: (1) to publicize the existence of the areas for domestic vessels, and (2) to provide initial notice to foreign vessels. The Coast and Geodetic Survey indicated willingness to designate the areas on its charts provided that the Corps would give some assurance of permanency of the existing lanes, and publish in the Federal Register their descriptions and the conditions upon which they exist. From 1962 until 1966 the Corps issued notices, held public hearings, and evaluated data in an attempt to secure the most permanent possible location of fairways. The first publication in the Federal Register occurred on Tuesday, January 25, 1966[22] and listed some forty fairways and anchorage areas for the Gulf of Mexico. The most recent revision[23] of the description of the areas is prefaced as follows:

> (a) *Purpose.* Fairways and anchorage areas as described in this section are established to control the erection of structures therein to provide approaches through oil fields in the Gulf of Mexico to entrances to the major ports along the Gulf Coast.

22. 31 Fed. Reg. 955 (1966).

23. 33 Fed. Reg. 18679 (1968).

(b) *Permits.* Department of the Army permits are required . . . for work or structures in the Gulf of Mexico in coastal waters and the waters covering the outer continental shelf. The Department of the Army will grant no permits for the erection of structures in the areas designated as fairways, since structures located therein would constitute obstructions to navigation. The Department of the Army will grant permits for the erection of structures within an area designated as an anchorage area, but the number of structures will be limited by spacing, as follows: The center of a structure to be erected shall be not less than two (2) nautical miles from the center of any existing structure. In a drilling or production complex, associated structures shall be as close together as practicable having due consideration for the safety factors involved. A complex of associated structures, when connected by walkways, shall be considered one structure for the purposes of spacing. A vessel fixed in place by moorings and used in conjunction with the associated structures of a drilling or production complex, shall be considered an attendant vessel and its extent shall include its moorings. When a drilling or production complex includes an attendant vessel and the complex extends more than five hundred (500) yards from the center of the complex, a structure to be erected shall be not closer than two (2) nautical miles from the near outer limit of the complex. An underwater completion installation in an anchorage area shall be considered a structure and shall be marked with a lighted buoy as approved by the United States Coast Guard.

(c) *Modification of the areas.* The fairways and anchorage areas are subject to modification but only after due notification and consideration of the views of interested parties, and advance publication of any adverse determination. . . .[24]

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24. Id., amending 33 C.F.R. § 209.135 (1968). This legend also appears on United States Coast and Geodetic Survey nautical charts.

Subsequent publications in the Federal Register have been largely devoted to correction of errors, to minor revision in location of fairways and anchorages, and, to a lesser extent, to the creation of new fairway areas.[25] These publications in the Federal Register are followed by special notices of the Corps executed by the District Engineer and circulated to all interested parties. The most significant modification in the original configuration of fairways was initiated by public notice dated June 5, 1967, issued by the New Orleans Engineer District, providing for the establishment of parallel fairways 70 to 120 miles from the coastline, with connecting access fairways.[26] This notice was issued in response to a joint letter from the Offshore Operating Committee and the American Merchant Marine Institute requesting that the Corps (after extensive private meetings to elaborate details) review and consider the establishment of such parallel fairways. Public hearings were then held and certain adjustments made in response to issues raised by interested parties. The regulations and designations published in the Federal Register on December 18, 1968 and depicted on the

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25. See 32 Fed. Reg. 14392 (1967) (redesignating the limits of the Cat Island Pass Safety Fairway); 32 Fed. Reg. 17527 (1967) (recompilation of 33 C.F.R. § 209.135; subsequently reprinted in January 1, 1968, revision of the Code of Federal Regulations); 33 Fed. Reg. 3063 (1968) (establishing Freshwater Bayou Safety Fairway and amending others); 33 Fed. Reg. 3341 (1968) (correcting error in February 16, 1968, publication; 33 Fed. Reg. 3430 (1968) (correcting error in December 7, 1967, publication); 33 Fed. Reg. 15797 (1968) (modification of the section on issuance of permits and certain fairway designations); 33 Fed. Reg. 16346 (1968) (correcting error in October 25, 1968, publication); 33 Fed. Reg. 17243 (1968) (correcting error in October 25, 1968, publication); 33 Fed. Reg. 18679 (1968) (recompilation of 33 C.F.R. § 209.135).

26. See maps on pages 62 & 63, indicating the ultimate location of a portion of such parallel fairways.

United States Coast and Geodetic Survey charts are the ones effective as of the date of this writing.

III

JURISDICTIONAL AND OTHER LEGAL QUESTIONS

The creation of the fairways in the Gulf Coast area raises important legal questions concerning jurisdiction to permit installation of offshore structures and to establish and enforce regulations affecting navigation on the high seas at considerable distances from the coastline, as well as the effect of such a system on the international obligations of the United States.

A. Permissible Mineral Exploitation Structures

The 1958 Geneva Convention on the Continental Shelf accords coastal states sovereign rights for the purpose of exploring and exploiting the natural resources of the continental shelf[27] in the area "adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[28] Although specifying that such rights do not "affect the legal status of the superjacent waters as high seas, or that of the air space above those waters,"[29] the Convention permits the construction, maintenance, and operation of installations and other devices necessary for the exploration and exploita-

27. Convention on the Continental Shelf, Art. 2, para. 1. Done at Geneva on 29 April 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

28. Id. at Art 1

29. Id. at Art. 3.

tion of the natural resources of the continental shelf and for the establishment of safety zones around these installations and devices for their protection.[30] The Convention also states that the exploitation of natural resources on the continental shelf "must not result in any unjustifiable interference with navigation,"[31] that "[d]ue notice must be given of the construction of any such installations and permanent means for giving warning of their presence must be maintained,"[32] and that "[n]either the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea-lanes essential to international navigation."[33] Article 15 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that "[t]he coastal state is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea."[34]

Turning to national legislation, the Outer Continental Shelf Lands Act provides that "[t]he Authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf."[35] In addition to securing ap-

30. Id. at Art. 5, paras. 2 and 3. Article 5, para. 4, provides: "Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State."

31. Id. at Art. 5, para. 1.

32. Id. at Art. 5, para. 5.

33. Id. at Art. 5, para. 6.

34. See note 18 supra.

35. 43 U.S.C. § 1333(f) (1964).

proval of offshore installations by the United States Geological Survey pursuant to the regulations issued by the Secretary of the Interior for mineral leasing on the outer continental shelf,[36] mineral lessees are also required to obtain a permit from the Corps of Engineers for the installation of such structures, pursuant to the provisions of the Rivers and Harbors Act of 1899,[37] which was made applicable to the outer continental shelf by the above-quoted provision of the Outer Continental Shelf Lands Act. As a condition to the issuance of its permit, the Corps requires compliance with the United States Coast Guard regulations concerning lighting and other safety aspects of offshore installations.[38] Thus, compliance with Article 5 of the Convention on the Continental Shelf is effected insofar as safety devices are required for mineral installations implanted on the continental shelf. For operations in submerged lands under state jurisdiction, local laws and regulations would apply, although federal law would still govern erection of offshore structures.[39] The Corps follows the practice of granting permits for structures in any area where the Department of the Interior has leased outer continental shelf lands for mineral exploitation. Many questions have been raised concerning the seaward extent of the United States' jurisdiction over continental shelf areas,[40] but it appears that, in the absence of resolu-

36. 30 C.F.R. §§ 250.18, 250.34(a) (1969).

37. See note 16 supra.

38. 33 C.F.R. §§ 67.01 - 67.50, 140 - 146 (1969). These regulations relate to, inter alia, private aids to navigation (visual and auditory), inspections, construction and arrangement, lifesaving appliances, fire-fighting equipment, and general operations.

39. See note 10 supra.

40. In dispute is the disjunctive definition of the shelf given in the Convention on the Continental Shelf (see text accompanying

tion of those issues, the Corps, like the Department of the Interior, will continue to exercise jurisdiction where exploitation is technically feasible."[41]

B. Jurisdiction Over Navigation

Jurisdiction of the Corps of Engineers does not extend to the waters over the outer continental shelf, but only to "artificial islands and fixed structures" on it.[42] Accordingly, the Corps has no jurisdiction to establish fairways or sea-lanes as mandatory routes for shipping outside the territorial sea of the United States. However, international conventions and declarations have recognized the necessity for regulating and restricting navigation in certain well-travelled routes on the high seas, and it is quite likely that a state would be justified in some forms of unilateral action outside its territorial sea where existing conditions posed a threat to safety of life or property.[43]

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note 28, supra). For various interpretations, see Study Prepared by the Secretriat of the United Nations for the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC.135/19 paras. 11-38 (1968); Brown, The Outer Limit of the Continental Shelf, 1968 Jurid. Rev. 111 (1968); Grunawalt, The Acquisition of the Resources of the Bottom of the Sea—A New Frontier of International Law, 34 Military L. Rev. 101, 125-29 (1966).

41. With the increased interest in establishing a regime for the deep ocean floor (i.e., the area of submerged lands beyond national jurisdiction), a number of proposals have been made for declaring a moratorium on continental shelf leasing activities beyond the 200-meter isobath. See, e.g., Commission on Marine Science, Engineering and Resources, Our Nation and the Sea, 155-57 (1969). However, adoption of such a restraint does not seem likely in the near future.

42. See note 35 supra.

43. There is a critical distinction, however, between regulations affecting lighting, prescribing rules of the road, and the like, on the one hand, and making large areas of the high seas completely off limits to navigation, on the other. The former constitutes the type

The International Convention for the Safety of Life at Sea, 1960," obliges signatory nations to insure that safe routes are followed in converging vessel traffic areas in the North Atlantic Ocean. Although the treaty obligations are limited to the North Atlantic, the Commandant of the Coast Guard established a policy, in January 1965, of expanding this effort to make vessel traffic safe at the approaches to all major United States ports. Certainly the shipping safety fairways scheme developed in the Gulf of Mexico is consistent with the purpose and objectives of the Safety of Life at Sea Convention, and the work that has already been done in this regard will aid in achieving the Commandant's policy.

The Intergovernmental Maritime Consultative Organization ("IMCO"), an international agency long concerned with the problem of preserving safety of life and property at sea through the use of traffic separation lanes, has recently indicated that it will begin to deal with the problem of mineral exploitation installations on the world's continental shelves. A draft resolution recommending the establishment of fairways through offshore exploration areas was adopted by IMCO's Maritime Safety Committee for sub-

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of "reasonable regulation" necessary for compatible multiple use of the area, while the latter smacks of *mare clausum* where the coastal state "appropriates" areas of the high seas for its exclusive use. For example, under regulations promulgated pursuant to the Outer Continental Shelf Lands Act (see 43 C.F.R. § 3380.1), only citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States (or any of its states or territories) have the right to exploit United States continental shelf resources. This is, of course, consistent with the spirit and letter of the Convention on the Continental Shelf, but should similar prohibitions ever be applied to the superjacent waters, the specter of *mare clausum* would be raised and a violation of provisions of the Convention on the High Seas would be evident.

44. [1965] 16 U.S.T. 187, T.I.A.S. No. 5780, 536 U.N.T.S. 27.

mission before the IMCO Assembly in the fall of 1969. That resolution provides:

> The Assembly,
>
> NOTING Article 16 (i) of the IMCO Convention concerning the function of the Assembly,
>
> RECOGNIZING the need for ensuring unencumbered exploitation of seabed resources as well as safety at sea,
>
> HAVING CONSIDERED difficulties which would result from the conjestion of navigable waters by off-shore platforms or other structures,
>
> HAVING ALSO CONSIDERED the Recommendation adopted by the Maritime Safety Committee at its 18th session,
>
> RECOMMENDS that governments:
>
> (i) ensure that the exploitation of seabed resources does not seriously obstruct sea approaches and shipping routes;
>
> (ii) consider the establishment of fairways or shipping routes through off-shore resource exploration areas at an early stage so as to ensure the unencumbered passage of marine traffic through the areas at all stages of exploitation; [and]
>
> (iii) take into account the principles adopted by IMCO with respect to routing when considering the establishment of such fairways or shipping routes.[45]

Clearly the efforts of the shipping and mineral industries, as well as of the Corps and other state and federal agencies, have already been directed to achieving the

45. U.N. Doc. A/ES. IV/9/Add. 1.

objectives of this resolution in the Gulf of Mexico. Assuming that the resolution is adopted by the Assembly, it is possible that IMCO may wish to study in some detail the approach and technique used in the Gulf in considering specific recommendations."[46]

C. *Use Priorities Between Navigational And Mineral Interests*

Since the concept of shared use of a resource area is involved in this conflict, valid inquiry might be made as to whether one or the other of the uses involved is entitled to any preferential treatment based on historical or other factors. Whether the participants in preparatory meetings and conferences and participants in the 1958 United Nations Conference on the Law of the Sea recognized any priority between mineral exploitation and navigational uses of the high seas above the continental shelf is a matter that has been analyzed elsewhere[47] and will not be discussed in great detail here. None of the parties to the discussions and conferences which led to the adoption of the shipping safety fairways in the Gulf of Mexico predicated their positions upon a prior right to utilize the area in which the conflict was occurring or was expected to occur. Nevertheless, it is interesting to observe the de-

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46. For a more detailed examination of the work of IMCO in this area, see Repkin, supra note 12.

47. Griffin, supra note 11, at 74-76. Griffin concludes:
"1. In the derivation of Article 5 of the Convention on the Continental Shelf [relating to the construction of fixed structures] no presumption was involved in favor of any particular use in gross, e.g., navigation over shelf exploitation; unjustifiable interference involves a two-way assessment of interests and needs. 2. Paragraph 6 of Article 5 is itself only the result of an assessment that in 'sea lanes essential to international navigation' the interests and needs of navigation outweigh those of shelf exploitation. Id. at 76.

velopment of encroachments on the principle of freedom of the seas (i.e., their non-appropriation) and to see how navigation has been relegated from enjoying a nearly absolute degree of freedom to being just one of many simultaneous uses of the marine environment which must operate with reasonable regard for other users.

The Truman Proclamation,[48] by which the United States declared that the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to its coasts appertained to it and were subject to its jurisdiction and control, provided that "[t]he character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."[49] Although it may be true to say that the Proclamation itself did not and could not adveresely affect freedom of navigation, it was somewhat shortsighted to expect that the logical course of events (i.e., the exploitation of the claimed natural resources) would not result in the erection of structures which could become a hazard to navigation. However, the purpose of this provision of the Truman Proclamation, as well as of its counterpart in the Convention on the Continental Shelf and the Outer Continental Shelf Lands Act, was not to effect a navigational priority but rather to disclaim any attempt to subject the superjacent waters to national appropriation or jurisdiction.

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48. Pres. Proc. No. 2667, 3 C.F.R. 67 (Comp. 1943-1948), 13 Dep't State Bull. 485 (1945).

49. The press release accompanying the Proclamation stated that "[w]hile asserting jurisdiction and control of the United States over the mineral resources of the continental shelf, the proclamation in no wise abridges the right of free and unimpeded navigation of waters of the character of high seas above the shelf, nor does it extend the present limits of the territorial waters of the United States." 13 Dep't State Bull. 484-85 (1945).

The Convention on the Continental Shelf provides that "[t]he rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters."[50] The Outer Continental Shelf Lands Act, under which the continental shelf lands of the United States are administered, provides that "[t]his subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected."[51] These pronouncements, as in the case of the Truman Proclamation, were designed to avoid appropriation of vast sea areas and to restrict the jurisdiction involved to the exploitation of the natural resources of the seabed and subsoil. This is evidenced by the provisions of the Convention on the Continental Shelf permitting erection of structures necessary to exploit the resources over which jurisdiction has been granted,[52] and becomes quite clear when viewed in the light of the "multipe use" provision of Article 2 of the 1958 Geneva Convention on the High Seas.[53]

IV

QUESTIONS OF EFFECTIVENESS

Given the historical development and appropriate jurisdictional authority to establish the shipping safety fairway system, the critical question is whether such a system has reduced navigation hazards in the Gulf of Mexico, bearing

50. Supra note 27, at Art. 3.

51. 43 U.S.C. § 1332(b) (1964).

52. Supra note 27, at Art. 5.

53. Supra note 3.

in mind that it cannot reasonably be expected to cope with all problems arising from this multiple use of the ocean environment. Collision with structures is only one element in the conflict of interests between navigation and mineral exploitation. For instance:

> [O]ff the Port of Galveston a ship lost 37 hours anchored in fog because the ship's radar could not differentiate between the sea buoys leading into the Port and nearby oil installations. Also, off the Port of New Orleans ships could not locate the key sea buoy marking the channel entrance because it was hidden by an oil installation.[54]

In this article, however, the analysis will be directed to the present or future effectiveness of the system in reducing ship-installation collisions.

More than fifty collisions involving ships and offshore installations have occurred in the Gulf of Mexico since 1960.[55] There is no evidence that the number has declined absolutely since adoption of the fairway system, or in proportion to its expansion. Available data indicate that, although fairway use is on the increase, many vessels in the Gulf of Mexico do not pay attention to them. Indeed, a vessel making its way from New Orleans to Galveston could hardly be expected to travel 70 miles seaward, thence along the parallel fairway from the New Orleans area to the Galveston area, and thence 140 miles

54. Griffin, supra note 11, at 74.

55. Report of the Panel on Management and Development of the Coastal Zone, supra note 11, at 25. Representatives of the United States Coast Guard have indicated that the figure of fifty is probably low if collisions involving *all* types of vessels are included and if consideration is given to an apparently large number of unreported incidents.

landward to Galveston, when the trip could be shortened nearly 200 miles, and without unreasonably increasing the chances of collision, by cutting directly across from the mouth of the Mississippi to the port of Galveston. Moreover, many fairways extend only a short distance into the Gulf, and ships emerging from them *must* travel across areas dotted with offshore installations, either to reach their ports of destination or to reach established fairways. Thus, the efficiency of the fairways in reducing the collision rate and other possible conflicts in the area cannot be determined with reliability at this time. However, should offshore mineral development continue to extend seaward in the same concentrations as now exist closer to shore,[56] making any navigation in the area extremely hazardous, the established parallel shipping safety fairway system might be utilized as a measure of self-protection by the shipping industry.

A review of the cases to date indicates that no liability has been predicated on the fact that a vessel in a ship-structure collision was not following an established shipping safety fairway when the collision occurred. Although jurisdiction may not exist to make the lanes mandatory, particularly with respect to foreign vessels, the establishment of presumptions concerning fault might have the

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56. This does not see unlikely since, of the total estimated offshore petroleum reserves of 4.3 billion barrels for the United States, some 2.4 billion barrels lie off the coast of Louisiana. See 2 Comm'n on Marine Science, Engineering and Resources, Report of the Panel on Marine Engineering and Technology, pt. VI, at 162 (1969). Of course, some re-evaluation of the offshore leasing program is being undertaken as a result of the Santa Barbara Channel oil pollution incident of January-February 1969, and the extent of future development is dependent on the outcome of that study.

effect of restricting shipping to fairways, where feasible.[57] This cannot be the entire solution, however, for commercial transportation is not the only use involved—fishing vessels ply these waters also. To require commercial vessels to adhere to certain routes may be possible, but to place a similar burden on fishing vessels would be unreasonable, since the latter must go where the fish are. Even commercial shipping cannot be completely relegated to such a regime, since not all points of departure and ports of call are linked by a system of fairways. Accordingly, it would seem that the law in this area should develop not so much by the enacting of comprehensive legislation as on a case-by-case basis, taking into consideration the nature of the vessel, the nature of the voyage, the facts surrounding the collision, the relative equities involved in the conflicting uses, and similar factors. Appropriately evolved, such a judicial doctrine could go far toward making the fairway concept meaningful, in the absence of power to enforce compliance.

In the interim, it is expected that more and more masters of vessels will respect and adhere to the lanes. In a recent article, Capt. J. E. Baker of Lykes Brothers Steamship Company suggested why the fairways would be more frequently used in the future:

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57. This is, of course, an example of "internalizing" costs under cost-benefit analysis economic theory. They desired social objective is the limitation of ship-structure collisions. By "internalizing" the cost (i.e., making the shipping companies liable for damages resulting from collisions), while offering an alternative (i.e., the use of shipping safety fairways), the natural economic pressures will, in theory, result in increased use of the fairways by the shipping interests in order to maximize profit. In view of certain jurisditcional difficulties concerning mandatory observance of fairways at substantial distances from the coastline of the United States, this approach may well be the most feasible solution.

> [F]irst . . . the increased concentration of offshore structures will make certain ocean areas almost impassable by large vessels. The second factor concerns the legal liability assigned by courts ruling on cases of collision between ship and artificial island. In spite of cross complaints, the courts have consistently found the vessel at fault, charging failure to use, or improper use of, radar, improper lookout, and failure of the vessel personnel to acquaint themselves with the existence and location of the artificial island. It is only a matter of time before some judge declares that the 'ordinary practice of seamen' requires navigation within the fairways, and another facet will be polished on the stone of 'good seamanship.'
>
> The third factor which will compel navigation within the fairway is the frequent and rapid shifting of drilling sites accomplished with a mobile drilling unit. The courts have held that sufficient public notice is made of the erection of the offshore structures, and that all mariners must avail themselves of this knowledge. . . . However, in this day of quick vessel turnaround and frequent personnel change, it would be easy to imagine that a notice could be missed or overlooked by a navigator. . . . For such ships to navigate outside the fairway system during certain periods could be courting collision.[58]

Necessity, therefore, may compel closer adherence to the fairways without the use of a legal regime to require compliance. Such a system has the obvious advantage of skirting some of the difficult jurisdictional questions raised earlier.

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58. Baker, supra note 7.

CONCLUSIONS

(1) The technique utilized in resolving the conflict of interest in the Gulf of Mexico is practicable and likely to be perpetuated in the future as other and different conflict situations arise.

(2) Assuming jurisdiction of the Corps of Engineers over the erection of structures, no matter how far seaward the latter may occur, the shipping safety fairway device assures safe lanes for seagoing vessels in areas of high platform density.

(3) The fairway device is compatible with all United States international obligations.

(4) If the fairway system is to be truly effective, masters of vessels must adhere more strictly to existing lanes.

(5) Probably the most feasible means of persuading navigational interests to use the lanes and of achieving their quasi-mandatory use would be for the courts to hold that a vessel failing to use one under conditions indicating its use is in violation of the Rule of Good Seamanship,[59] and therefore at fault for a collision with a drilling installation, provided the lane has been established a reasonable distance away from the installation.

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59. International Rules for the Prevention of Collisions at Sea, Article 29, 33 U.S.C. § 147a.

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In The

Supreme Court of the United States

October Term, 1970

No. 1827

SS Ranchers, Inc. Engines, Trubbs, Etc. and
Rio Pallesa Oil Mat., S.A.,

Petitioners,

v.

Continental Oil Company, Atlantic
Richfield Company, Getty Oil Company,
and Cities Service Oil Company,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Printing Company, Inc., Houston

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1027

SS ELECTRA, Her Engines, Tackle, Etc. and
RIO PALMEA CIA. NAV., S.A.,

Petitioner,

v.

CONTINENTAL OIL COMPANY, ATLANTIC
RICHFIELD COMPANY, GETTY OIL COMPANY,
and CITIES SERVICE OIL COMPANY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Judges of Said Court:

QUESTION PRESENTED

Whether the owners of a tortiously damaged offshore platform are entitled to recover income lost due to the platform's being out of service during necessary repairs.

REASONS FOR DENYING THE WRIT

The respondents had two producing oil wells under their offshore platform when the petitioner's ship collided with and disabled it. During the period of necessary repairs the respondents, but for the collision, would have produced oil having a net value, *i.e.*, market value less cost of production, royalty, and transportation, of $60,000. The United States Court of Appeals for the Fifth Circuit has held that this $60,000 represents "lost profit" which the respondents are

entitled to recover from the tort feasor. The decision below, which involves only a minor aspect of the damages issue in this case, is not in conflict with any other decision, indeed is supported by the decisions, including decisions of this Court,[1] and is obviously correct.

The maxim of *restitutio in integrum*, discussed by the Court of Appeals and now invoked by the petitioner, requires that an innocent tort victim be placed in the pecuniary position it would have been in but for the injury.[2] That purpose ordinarily is accomplished by awarding the victim the cost of repairing its property plus any income it lost as a result of that property's being out of service. The application of this measure in marine collisions commonly calls for the payment of unearned freights or lost charter

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[1] Numerous supporting authorities are cited by the Court of Appeals. Opinion, Appendix to Petition herein, p. 45-46, 431 F.2d 391, 392. The petitioner offers nothing to distinguish these decisions.

[2] *Restitutio in integrum* is the classic maxim of marine collision damage law. Phoenix Ins. Co. v. Atlas, 93 U.S. 302, 307 (1876). The measure of the damages of the innocent collision victim has also been equated with "full indemnity" (The Baltimore, 8 Wall. 377, 387 (1869)), "full compensation" (The Virginia Ehrman and the Agnese, 97 U.S. 309, 317 (1878)), and "entire compensation" (The Louisville, (Strout v. Foster), 1 How. 89, 92 (1843)). It is an application of a fundamental damages concept:

> "It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed." Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146, 155 (1925).

The leading British text, citing the earlier English authorities, describes the operation of the principle as follows:

> "The object of the award of damages arising out of a collision is to place the owner of the lost or injured ship as nearly as may be in the same pecuniary position as he would have been in but for the collision." Marsden, Collisions at Sea (11th Ed.) 338.

hire on a vessel, in addition to the cost of its repair. But an allowance for their lost income is not the peculiar privilege of injured *shipowners*. As the Court of Appeals pointed out in this case, the same principle is available to tort victims ashore. Opinion, Appendix to Petition herein, p. 47, 431 F.2d 391, 393, citing *Cranston Print Works Co.* v. *Public Service Co. of North Carolina*, 291 F.2d 638 (4th Cir. 1961), and *Brooks Transp. Co.* v. *McCutcheon*, 154 F.2d 841 (D.C. Cir. 1946). The task, whether afloat or ashore, is simply to find out what "net income" or "profit" was lost, though the form of the "income" of course may vary, depending on the nature of the business interrupted. In an operation such as the respondents', their net income or profit consisted of the value of the oil they sold less the cost of producing it.[3] This was the "net value of the production" lost by the respondents during the subject repair period, plainly the legal measure, as held by the Court of Appeals, of the respondents' lost profit.

While the decision of the Court of Appeals in this case is of great interest to these parties, it is hard to believe it is likely to be considered as having much moment outside the limits of this controversy. The decision involves no departure from established principles and precedents and never could be an occasion (as suggested by the petitioner) for uncertainty among others who may someday chance to be confronted by a similar issue. There is thus no need for

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[3] "Net value" of 130 days production from the respondents' wells was stipulated to be $60,000. As the petitioner points out, this figure represents the market value of that much crude oil less the cost of raising it to the surface, barging it, and paying the royalty owner. This of course is the precise definition of the respondents' lost "net income" or "net profit". Fixed expenses, such as marketing and sales expenses, which could not be suspended during the disability of this platform, obviously were not required to be deducted for the purpose of measuring the respondents' damage.

this Court to concern itself with the question involved in this suit.

Finally, the petitioner urges that the Court of Appeals' opinion is based on a miscontruction of a fact stipulation. If the petitioner were right about that, certainly the case would not be an appropriate vehicle for clarification by this Court of a legal principle. In fact, the respondents respectfully submit, as clearly appears from its opinion and a review of the record, the Court of Appeals construed the stipulation accurately, and the undertaking by this Court of the burden of reviewing the lower Court's decision could serve no worthwhile purpose in this case.

CONCLUSION

WHEREFORE, respondents pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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JOSEPH NEWTON

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